(13)

No. 91-990-CFX
Status: GRANTED

Title: Dale Farrar and Pat Smith, Co-Administrators of Estate of Joseph D. Farrar, deceased, Petitioners
v.
William P. Hobby, Jr.

Docketed:
December 16, 1991

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Maness,Michael A.

Counsel for respondent: Cowan,Finis,E., Keel,Patrick O.

Entry	Date	Note	Proceedings and Orders
1	Dec 16 1991	G	Petition for writ of certiorari filed.
3	Jan 14 1992		Brief of respondent William P. Hobby, Jr. in opposition filed.
2	Jan 22 1992		DISTRIBUTED. February 21, 1992
5	Feb 18 1992		Letter from petitioner citing Ninth Circuit decision received and distributed
4	Feb 24 1992		Petition GRANTED.
			**********
6	Mar 19 1992		Record filed.
		*	Partial proceedings and briefs United States Court of Appeals for the Fifth Circuit.
8	Apr 7 1992		Order extending time to file brief of petitioner on the merits until April 20, 1992.
9	Apr 8 1992	G	Motion of American Bar Association for leave to file a brief as amicus curiae filed.
16	Apr 17 1992		Record filed.
		*	Original proceedings U.S. District Court, Southern District of Texas (3 BOXES)
10	Apr 20 1992		Order further extending time to file brief of petitioner on the merits until April 22, 1992.
12	Apr 22 1992		Joint appendix filed.
13	Apr 22 1992		Brief of petitioner Dale Farrar, et al. filed.
15	Apr 24 1992		Order extending time to file brief of respondent on the merits until June 15, 1992.
11	Apr 27 1992		Motion of American Bar Association for leave to file a brief as amicus curiae GRANTED.
17	Jun 12 1992		Brief of respondent William P. Hobby, Jr. filed.
18	Jun 12 1992		Brief amicus curiae of Equal Employment Advisory Council filed.
19	Jun 15 1992		Brief amici curiae of Washington Legal Foundation, et al. filed.
20	Jun 15 1992		Brief amici curiae of National League of Cities, et al. filed.
21	Jun 15 1992		Brief amici curiae of Alabama, et al. filed.
22	Jun 15 1992		Brief amicus curiae of County of Los Angeles filed.
23	Jun 15 1992		Brief amici curiae of Americans for Effective Law Enforcement, et al. filed.
24	Jul 10 1992		CIRCULATED.
25	Jul 21 1992		SET FOR ARGUMENT FOR WEDNESDAY, OCTOBER 7, 1992.(3RD CASE).
26	Oct 7 1992		Letter from Counsel for the petitioners received and

APP

No. 91-990-CFX

Entry	Date	Note	Proceedings and Orders
			distributed.
27	Oct 7 1992		ARGUED.

91-990

No. _____.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 1991

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QUESTION PRESENTED

Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?

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IN THE

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Fifth Circuit's first opinion directed the award of nominal damages to petitioners. *Farrar v. Cain*, 756 F.2d 1148 (5 Cir. 1985) (Pet. App. 2). On remand, the district court awarded attorney's fees to petitioners in an unreported memorandum and order (Pet. App. 12, 13, 29).

The Fifth Circuit's second opinion reversed, on the theory that plaintiffs recovering nominal damages for federal civil rights violations are not "prevailing parties," and therefore are not entitled to attorney's fees under 42 U.S.C. § 1988, because they have gained only "a *de minimis* or technical victory." *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5 Cir. 1991) (Pet. App. 30).

JURISDICTION

The opinion and judgment of the court of appeals were entered on September 17, 1991 (Pet. App. 30, 46). This petition for certiorari was filed within 90 days thereafter and is timely. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (Pet. App. 47).

STATEMENT OF THE CASE

Joseph Farrar and his son Dale sued Respondent William P. Hobby and other public officials under 42 U.S.C. § 1983.[1] They alleged, among other claims, that the defendants violated their right to due process of law by illegally closing a school they operated in Liberty County, Texas. The jury returned a verdict finding that Hobby violated Joseph Farrar's federal civil rights under color of state law, but awarded no damages for that violation. The district court entered a

[1] Joseph Farrar died before trial. Petitioners, as co-administrators of his estate, were ordered substituted as plaintiffs under F.R.Civ.P. 25(a) (Pet. App. 1).

take-nothing judgment on the jury's verdict.

Relying on *Carey v. Piphus*, 435 U.S. 247 (1978), the Fifth Circuit reversed:

> Even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages. We have awarded nominal damages, not to exceed one dollar, when an infringement of a fundamental right was shown and we have also held that, once a jury has found a violation of a plaintiff's civil rights, it "could not ignore that finding in calculating damages. Violation of [the plaintiff's] constitutional rights was, at a minimum, worth nominal damages."[2] Because the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not to do so when the Farrars so moved in their motion for a new trial.

Farrar v. Cain, 756 F.2d 1148, 1152 (5 Cir. 1985) (citations omitted) (Pet. App. 10).

On remand, petitioners filed an application for attorney's fees under 42 U.S.C. § 1988. Following a lengthy hearing, the district court awarded to them against Hobby $280,000.00 in attorney's fees, $27,932.00 in costs and expenses, and prejudgment interest (Pet. App. 12).

[2] *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5 Cir. 1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5 Cir. 1984), *aff'd in part and rev'd in part*, 739 F.2d 993 (5 Cir. 1984).

Hobby appealed. A different panel of the Fifth Circuit, one judge dissenting, reversed the fee award, holding that petitioners were not "prevailing parties" within the meaning of 42 U.S.C. § 1988. The Fifth Circuit acknowledged that "[o]ur holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits." 941 F.2d at 1316 (Pet. App. 41). It conceded the principle, established by *Carey v. Piphus*, 435 U.S. 247 (1978), that "[a] violation of constitutional rights is never *de minimis*," because it is never "so small or trifling that the law takes no account of it." 941 F.2d at 1315, quoting *Lewis v. Woods*, 848 F.2d 649, 651 (5 Cir. 1988) (Pet. App. 40).

Nonetheless, without citing or even mentioning *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the panel majority interpreted *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988) collectively to mean that a civil rights plaintiff recovering nominal damages has attained only a *de minimis* or technical victory, and therefore is not a "prevailing party" under § 1988. 941 F.2d at 1316 (Pet. App. 41). The court reasoned that a plaintiff "prevails" within the meaning of § 1988 only when the final decision changes "the legal relationship between the parties in a way that alters the defendant's behavior toward the plaintiff and that secures some of the relief sought by the plaintiff in bringing the suit." 941 F.2d at 1317 (Pet. App. 45). The panel concluded that "the recovery of one dollar is no victory under § 1988" and that "the plaintiff's victory, *as measured by the success actually obtained*, was merely a *de minimis* or technical success." 941 F.2d at 1315-16 (footnote omitted; emphasis added) (Pet. App. 40-41).

Petitioners did not seek panel rehearing or suggest rehearing en banc. Because its decision created an intercircuit conflict, the Fifth Circuit "circulated the opinion to the entire court as required by the court's policy. No member of the court has requested en banc consideration." 941 F.2d at 1316 n. 22 (Pet. App. 41).

REASONS FOR GRANTING CERTIORARI

1. As the Fifth Circuit concedes, its decision is in conflict with the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, all of which have held that a plaintiff's recovery of nominal damages for a federal civil rights violation supports the award of reasonable attorney's fees under 42 U.S.C. § 1988.

The Fifth Circuit's opinion pointedly acknowledges that the Second,[3] Seventh,[4] Eighth,[5] Ninth,[6] Tenth,[7] and Eleventh[8] Circuits all have concluded that a plaintiff recovering nominal damages is a "prevailing party" entitled to claim reasonable attorney's fees under § 1988. The Fourth Circuit and an intermediate state

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[3] *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2 Cir. 1991).

[4] *Smith v. DeBartoli*, 769 F.2d 451 (7 Cir. 1985), *cert. denied* 475 U.S. 1067 (1986).

[5] *Coleman v. Turner*, 838 F.2d 1004, 1005 (8 Cir. 1988).

[6] *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9 Cir. 1988).

[7] *Nephew v. City of Aurora*, 830 F.2d 1547 (10 Cir. 1987) (en banc), *cert. denied* 485 U.S. 976 (1988).

[8] *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11 Cir. 1987).

appellate court also have reached that result.[9]

Such virtual unanimity is understandable. Civil rights plaintiffs "prevail" under § 1988 when they "succeed on *any* significant issue in the litigation which achieves *some* of the benefit . . . sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). A judgment awarding even nominal damages reflects "the importance to organized society that [constitutional] rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The actual injury and the amount awarded may be trivial or insignificant. The principle at stake is not.

Congress was acutely aware when it enacted the Civil Rights Attorney's Fees Awards Act of 1976 that, in many civil rights cases, the relief at issue is worth less, in monetary terms, than the cost of litigating the claim. H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 9. It has authorized the allowance of sufficient compensation to encourage the litigation of meritorious claims, as a matter of national policy, even if the money damages realistically to be won would not otherwise be sufficient to attract competent counsel or to justify a lawsuit at all:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 2, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at 5910.

This Court consistently has recognized and implemented this congressional policy. "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986), quoted in *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). "Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Hensley v. Eckerhart*, 461 U.S. 424, 444 n. 4 (1983). A plaintiff in federal civil rights litigation acts "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and "often secures important societal benefits that are not reflected in nominal or relatively small damage awards." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). Until now, no federal appeals court has ever seriously questioned these principles.

Because the Fifth Circuit's opinion was circulated to all of that court's active judges prior to its publication, and because no judge of that court requested en banc hearing or rehearing, the decision

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[9] *Burt v. Abel*, 585 F.2d 613, 617-18 (4 Cir. 1978); *Tedesco v. City of Stamford*, 24 Conn.App. 377, 588 A.2d 656, 659 (1991); *but see Spencer v. General Electric Co.*, 894 F.2d 651, 662 (4 Cir. 1990) (dictum); *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881, 882-83 (1985), *cert. denied* 474 U.S. 989 (1985) (Justice White dissenting).

represents the considered, final judgment of the Fifth Circuit on an issue of undoubted national importance. There is no realistic likelihood that further litigation of the question in the lower federal courts "may help to illuminate [the] issue before it is finally resolved and thus may play a constructive role in the lawmaking process."[10] Answering the question presented involves nothing more than interpreting clear and unambiguous statutory language.

Nor are there any subsidiary reasons why the grant of certiorari here might be improvident or unwarranted. The question presented was squarely and definitively decided, after being capably briefed and argued in the Fifth Circuit by experienced counsel. There are no unresolved jurisdictional or procedural issues. There is no alternative ground for decision. There is no reasonable likelihood that Congress will amend the statute in the absence of a controlling decision from this Court.[11] The passage of time will not moot or alter the character of the question presented in any way.

Finally, the conflict is not of mere technical or abstract philosophical significance. Federal trial courts within the Fifth Circuit historically have decided a substantial proportion of all Title VII, § 1983, and other federal civil rights litigation filed each year in the

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[10] Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982).

[11] Congressional efforts to amend § 1988 to prohibit attorney's fees awards that are disproportionate to the damages recovered have failed twice. See proposed Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984), and S. 1580, 99th Cong., 1st Sess. (1985).

courts of the United States.[12] The decision in this case dramatically affects those cases. Even though the federal trial court here viewed an award of attorney's fees as both reasonable and appropriate, the Fifth Circuit's decision effectively overrode that exercise of the district court's traditional discretion.

This case presents a significant circuit conflict. Supreme Court Rule 10.1(a). The Court should grant certiorari to resolve it.

2. The Fifth Circuit's decision is in conflict with *City of Riverside v. Rivera*, 477 U.S. 561 (1986), which was not addressed or even cited in the court's opinion.

The district court based its award of attorney's fees on *City of Riverside v. Rivera*, 477 U.S. 561 (1986). The Fifth Circuit's opinion does not discuss or cite the case. There the Supreme Court "[rejected] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers," 477 U.S. at 574-76:

> Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial

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[12] The Office of the Circuit Executive of the United States Court of Appeals for the Fifth Circuit has advised counsel that since 1985 the Fifth Circuit has averaged 432 civil rights appeals per year. According to the Administrative Office of the United States Courts, during the fiscal year ending June 30, 1991, the Fifth Circuit decided 480 of 3,844 civil rights appeals (other than prisoner petitions) filed in all United States courts of appeals.

> monetary relief . . . Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages.

The Court in *Rivera* decisively repudiated the idea that entitlement to reasonable attorney's fees under § 1988 is necessarily contingent upon the amount of damages awarded, or that attorney's fees can be denied altogether simply because the compensable constitutional injury may seem slight. "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988." 477 U.S. at 578.

Indeed, in *Rivera* this Court cited with approval the Fifth Circuit's earlier holding in *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1220 (5 Cir. 1982), that "an attorney's fee award [under § 1988] may be supported by an award of nominal damages since the successful claim serves to vindicate constitutional rights." 477 U.S. at 576 n. 8. *Basiardanes* in turn cites in support of that holding footnote 11 in *Carey v. Piphus*, in which this Court noted that "the potential liability of § 1983 defendants for attorney's fees . . . provides additional — and by no means inconsequential — assurance that agents of the State will not deliberately ignore due process rights." 435 U.S. at 257 (citation omitted).

The Fifth Circuit misconstrued *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), *Rhodes v. Stewart*, 488 U.S. 1 (1988), and

Hewitt v. Helms, 482 U.S. 755 (1987). The panel majority thought those decisions collectively mean that a plaintiff recovering only nominal damages is not a "prevailing party" under § 1988, at least when damages are the exclusive relief sought. The majority believed that such an award neither "change[s] the legal relationship" between the parties, nor "secures some of the relief sought by the plaintiff in bringing the suit," 941 F.2d at 1317 (Pet. App. 45), but instead constitutes "merely a *de minimis* or technical success." 941 F.2d at 1316 (Pet. App. 41).

Hewitt v. Helms, 482 U.S. 755 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988) do not support the Fifth Circuit. In *Hewitt* the plaintiff obtained only "a favorable judicial statement of the law in the course of litigation that [resulted] in judgment *against the plaintiff*," who otherwise "obtained no relief." 482 U.S. at 760, 763 (emphasis added). In *Rhodes* "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." 488 U.S. at 4. This case is not moot. Petitioners "secured some of the relief sought." In light of *City of Riverside v. Rivera* and *Carey v. Piphus*, an award of nominal damages cannot plausibly be characterized as "no relief whatsoever."

In *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), the Court held that "a civil rights plaintiff is a prevailing party within the meaning of § 1988" and "has crossed the threshold to a fee award of some kind" if "the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit'." 489 U.S. at 791-92, quoting *Nadeau v. Helgemoe*, 581

F.2d 275, 278-79 (1 Cir. 1978). The Court interpreted this standard to require, "at a minimum . . . a resolution of the dispute which changes the legal relationship" between the parties. The opinion suggested in *dictum* that fees might be denied "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*." *Id.*

The Court cited as an example of "technical or *de minimis*" success the trial court's ruling in *Garland* that a school district policy was unconstitutionally vague, even though there was no evidence it had ever been applied to the plaintiffs. In this case, by contrast, the jury's verdict explicitly found that "Defendant Hobby committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States . . ."

Such a verdict, and the resulting judgment, constitute a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in [§ 1988]. Where such a change has occurred, the *degree* of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, *not to the availability of a fee award vel non*." *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. at 792-93 (emphasis added).

Characterizing as "purely technical or *de minimis*" a civil rights plaintiff's success in obtaining nominal damages for an acknowledged violation of the constitutional right to due process of law is irreconcilable with *Rivera*'s central premise that recovery of attorney's fees in federal civil rights cases is not dependent upon "obtaining substantial monetary

relief." It is likewise inconsistent with this Court's insistence in *Carey v. Piphus* that such an award is not some arcane ceremonial formality but an indispensable recognition of "the importance to organized society that [federal] rights be scrupulously observed." 435 U.S. at 266. In this country, at least, there are no *de minimis* constitutional deprivations.[13]

The conflict between the Fifth Circuit's holding and this Court's decisions in *Carey* and *Rivera* warrants the grant of certiorari. Supreme Court Rule 10.1(c).

3. The Fifth Circuit's denial of any attorney's fees whatever to plaintiffs who prevail in civil rights cases by recovering nominal damages disregards plain statutory language, undermines clearly expressed congressional policy, and presents an important question of federal law that has not been, but should be, settled by this Court.

The Fifth Circuit never reached or even intimated its position on the question of whether the attorney's fees awarded by the district court were "reasonable," in the sense demanded by § 1988. It did not decide whether the award should have been modified or reduced. Instead, it imposed an absolute bar to the recovery of *any* attorney's fees, in *any* amount, by *any* plaintiff awarded only nominal damages, in *any* federal civil rights case in *any* United States district court within the Fifth Circuit. The practical consequences of such an unprecedented holding are significant.

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[13] "The constitutional right transgressed in *Carey* — the right to due process of law — is central to our system of ordered liberty." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

1. The decision, if unreversed, will bind each of the federal trial courts in Texas, Louisiana, and Mississippi, and conceivably may be regarded as persuasive authority by state trial and appellate courts considering federal civil rights cases in those and other states as well. At least two United States district courts within the Fifth Circuit, relying on this case, already have refused to award attorney's fees to civil rights plaintiffs recovering nominal damages.[14]

2. The central holding below that recovery of nominal damages does not support a claim for attorney's fees casts substantial doubt on the status of attorney's fees awards under a myriad of other federal statutes. *Cf. United States Football League v. National Football League*, 887 F.2d 408 (2 Cir. 1989), *cert. denied* 493 U.S. 1071 (1990) (award of nominal damages of $1 under Clayton Act, trebled to $3, held to support award of attorney's fees of $5,529,247.25 and taxable costs of $62,220.92).[15] The statutory phrase "prevailing party" or its equivalent necessarily must have a consistent, easily determinable meaning. Congress cannot plausibly have intended the same statutory term to mean different things in different cases.

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[14] *Gladden v. Roach*, No. S-84-220-CA (E. D. Tex., November 7, 1991); *Garrison v. Box*, No. S-88-254-CA (E.D. Tex., October 11, 1991).

[15] The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 makes abundantly clear that "the amount of fees awarded [is to] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases." S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 6, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at 5913.

3. The Fifth Circuit's interpretation of the term "prevailing party" replaces a simple, straightforward, easily understandable statutory standard with an evanescent, fact-specific inquiry into the *degree* of success a party attains, measured only by the amount of money awarded and the court's perception of what motivated the litigation. If a § 1983 plaintiff wants a million dollars for a deprivation of federal rights, but recovers only $500.00, would the Fifth Circuit conclude that the plaintiff "prevailed" under § 1988? How about $50.00? How about $5.00? What if the plaintiff, as a matter of constitutional principle, wants no more than nominal damages?

The open-ended, essentially standardless inquiry mandated by the Fifth Circuit's decision threatens almost endless satellite litigation over an easy question that ought to be easily answerable. Congress cannot have intended such a simple issue to require another lawsuit to resolve it.

4. If a plaintiff awarded only nominal damages is not a "prevailing party" for purposes of recovering attorney's fees as "costs" under § 1988, such a plaintiff cannot have "prevailed" for purposes of taxing the costs of litigation under 28 U.S.C. § 1920 or any other federal statute. Clerical and witness fees, docket fees, deposition costs, and other expenses would be taxable as a matter of course against the plaintiff. From the Fifth Circuit's perspective, the defendant "prevailed." The plaintiffs "lost."

5. The Fifth Circuit's holding will have a devastating effect on federal litigation involving serious constitutional violations that do not inflict injuries compensable through significant monetary damages.

Substantial deprivations of federal rights will go unremedied simply because the injury to the victim is intangible. Congress did not intend that result.

No Supreme Court decision supports even by inference the Fifth Circuit's strange, stilted, unwieldy result, at variance with common sense and any literal reading of the plain, simple language of the statute. Denying *all* attorney's fees when only nominal damages are recovered in civil rights cases undermines a long-standing national commitment and substitutes the quasi-legislative and policy-making judgment of federal judges for that of Congress.

Civil rights plaintiffs recovering nominal damages, based upon a specific jury finding that federally protected civil rights have been violated, are "prevailing parties." Congress in § 1988 intended for them to be treated that way. It did not intend for an award of attorney's fees to be denied altogether "because the rights involved may be non-pecuniary in nature."[16] The Fifth Circuit's decision, relegating winners to the status of losers, presents an issue of importance to the administration of the federal civil rights laws. It has not been, but should be, settled by this Court. Supreme Court Rule 10.1(c).

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[16] S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 6, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at 5913.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 1991

*Counsel of Record

(Filed August 2, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR	§	
and	§	
DALE LAWSON FARRAR	§	
	§	CA NO. 75-H-987
VS.	§	
	§	
CLARENCE D. CAIN,	§	
RUTH URMY,	§	
WILLIAM P. HOBBY, JR.,	§	
RAYMOND W. VOWELL,	§	
LONNIE A. GRUVER,	§	
and ARTHUR J.	§	
HARTELL, III	§	

ORDER SUBSTITUTING CO-ADMINISTRATORS
AS PLAINTIFFS

This matter having come on before this Court for hearing on August 2, 1983 pursuant to the Motion of Pat Smith and Dale Farrar, Co-Administrators of the Estate of Dr. Joseph D. Farrar to substitute them as Plaintiffs in the above entitled cause; and it appearing to the Court after examination of the Motion, Briefs, and pleadings filed in this cause, that the application should be granted; therefore

IT IS ORDERED that the Motion be granted and that Pat Smith and Dale Farrar as Co-Administrators of the Estate of Dr. Joseph D. Farrar, Deceased, be substituted as Plaintiffs herein in the place and stead of Dr. Joseph D. Farrar, the Plaintiff of record.

DATED: August 2, 1983

Robert B. O'Conor, Jr.
Judge Presiding

(Filed April 8, 1985)

Joseph Davis FARRAR and Dale Lawson Farrar, Plaintiffs-Appellants,

v.

Clarence D. CAIN, et al., Defendants-Appellees.

No. 84-2099
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 8, 1985.

In section 1983 action, the United States District Court for the Southern District of Texas entered summary judgment for defendants, and plaintiffs appealed. The Court of Appeals, 642 F.2d 86, vacated and remanded. On remand, the United States District Court for the Southern District of Texas, at Houston, Robert O'Conor, Jr., J., entered judgment for the defendants and plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) plaintiffs had opportunity to object timely to proposed instructions and special interrogatories regarding, inter alia, award of compensatory and punitive damages, issue of foreseeability, and burden of proof, but apparently did not do so, thus largely precluding review of issues raised on appeal; (2) although punitive damages may be awarded in section 1983 action even in absence of actual injury, failure to object to jury charge and special interrogatories precluded review; (3) absent finding that conspirators deprived plaintiffs of their civil rights, jury's finding that conspiracy existed did not support award of damages, nominal or

compensatory, against the conspirators; and (4) since one defendant was found to have violated plaintiff's civil rights, jury should have awarded nominal damages, not to exceed $1.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, RANDALL, and TATE, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:*

In this suit against Texas state officials under 42 U.S.C. § 1983 for violation of the plaintiffs' civil rights, the trial court entered judgment for the defendants based on a jury verdict that found at least one of the defendants liable but awarded no damages. The plaintiffs appeal contending that the trial court erroneously instructed the jury on nominal and actual damages and erroneously failed to inform the jury that it might award punitive damages in the absence of actual damages. They also contend that we should remand for a new trial on damages. Because the plaintiffs failed to object to the jury charge on compensatory and punitive damages as given and we find no fundamental error in it, and because the trial court did not abuse its discretion in denying a new trial on that ground, we affirm the denial of those damages. Because the jury found that at least one defendant had violated the plaintiffs' civil rights, we reverse the trial

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* All parties have either waived or failed to request oral argument. The case was, therefore, decided on the briefs. Local Rule 34.3 and Fifth Circuit Internal Operating Procedure — Screening.

court's denial of nominal damages as to that defendant and remand for the court's entry of nominal damages, not to exceed $1.00.

Joseph D. Farrar and Dale L. Farrar, his son, owned and operated Artesia Hall, a school in Liberty County, Texas, for the care of delinquent, handicapped, or disturbed teenage boys and girls. The defendants, all Texas state officials, obtained a grand jury indictment against Joseph Farrar for the homicide of an Artesia Hall student and a state court temporary injunction against the operation of Artesia Hall. The homicide charge was later dismissed. In their § 1983 civil rights complaint, the Farrars alleged that the defendants violated their civil rights by, among other things, taking illegal steps to close the school, thereby depriving them of the right to practice their livelihood and profession. Answering special interrogatories, the jury found that one of the plaintiffs had violated the Farrar's civil rights, but it awarded no damages.

Challenging the jury instructions, the Farrars contend that the trial court erred in not instructing the jury on nominal damages and in not awarding nominal damages as a matter of law because, in civil rights cases, nominal damages are routinely presumed or inferred. They also argue that the court erred by including in the jury instructions foreseeability as a defining characteristic of proximate cause without observing that, although foreseeability may be a proper test for determining damages for unintentional tort violations of civil rights, it is not a proper prerequisite to obtaining recompense for intentional violations. Additionally, they claim that the trial court failed to instruct the jury that, once the plaintiffs prove a

constitutional violation, the burden shifts to the defendants "to show by a preponderance of evidence that there was no 'but-for causation in fact' relation between the constitutional violation and plaintiffs' damages."[1] Finally, the Farrars assert that the court committed reversible error in the special interrogatories by predicating any award of punitive damages on the jury's having awarded actual damages and by not granting their motion for a new trial.

Fed.R.Civ.P. 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests .... No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The purpose of this rule is to allow the trial court to correct any error before the jury begins its deliberation.[2] In *Delancey v. Motichek Towing*

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[1] The Farrars cite *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977), in support of this position. Given their failure to object to the jury charge, we do not address the propriety of applying *Mt. Healthy* in the manner the Farrars suggest. *See infra* text accompanying notes 2-10.

[2] *See* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2553, at 634 (1971).

Service, Inc.,[3] this court stated:

> This Court has consistently held that the specifications of errors dealing with the giving of or failure to give instructions will not be considered unless the party objects in the manner provided by the rule .... The objection must be sufficiently specific to bring into focus the precise nature of the alleged error.... A general objection presents nothing for review.[4]

The Farrars were given an opportunity to object timely to the proposed instructions and the special interrogatories. The record, however, is devoid of any indication that they objected to either with respect to any of the issues on appeal.[5] Moreover, the Farrars filed a proposed jury charge that failed to limit foreseeability to unintentional torts or to request a *Mt. Healthy*[6] charge.

Failure to object to the jury charge in the trial court precludes review on appeal unless the error is so fundamental as to result in a miscarriage of justice.[7]

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[3] 427 F.2d 897 (5th Cir.1970).

[4] *Id.* at 900 (citations omitted); *see also United States v. Marbury*, 732 F.2d 390, 403 (5th Cir. 1984).

[5] Although the Farrars have not provided us with a trial transcript, the appellees have provided us with an excerpt of the transcript which shows that the Farrars' counsel lodged no objection on these grounds. The record contains the same excerpt.

[6] 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, 483 (1977); *see supra* note 1 and accompanying text.

[7] *See Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir.1980); *cf. Wallace v. Ener*, 521 F.2d 215, 218-219

With regard to compensatory damages, our review of the record does not indicate that such a fundamental error was committed. The Farrars bear the burden of insuring that all their objections are made part of the record.[8] The Farrars, however, stated that they "have appealed to this court without a transcript and rely upon the record and questions of law presented in their brief." Even if an objection was lodged, it does not appear in the appellate record.[9] Reviewing the record on appeal, we find neither fundamental error nor miscarriage of justice.[10]

The Farrars also contend that the trial court erred in predicating the finding of punitive damages upon a finding of actual damages. They argue that, "since the jury found that Appellees violated Appellants' civil rights, the Appellants should be allowed to have a jury consider what amount, if any, would be appropriate punitive damages to deter Appellees from future unlawful conduct or punish them for their wrongful act in violating Appellant's civil rights."

Here, too, the Farrars' failure to object to the trial judge's charge to the jury and to the special interrogatories submitted to the jury precludes our review in the absence of plain error or manifest miscarriage of justice.[11] Although punitive damages

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(5th Cir.1975).

[8] *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 127 (5th Cir.1980) (citing Fed.R.App.P. 10(b) & (c)).

[9] *See supra* note 5.

[10] *Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir.1980).

[11] *See Whiting v. Jackson State Univ.*, 616 F.2d 116, 126-

may be awarded in a § 1983 action even in the absence of actual injury,[12] failure to object precludes review if, as here, there is no plain error or manifest miscarriage of justice.[13] The record shows that the interrogatory predicating an award of punitive damages on a finding of actual damages was brought to the attention of the court and that the Farrars' counsel agreed to the charge and advised the court that he had no objection.

The trial court did not err by failing to award nominal damages as to all of the defendants except Hobby. Interrogatory No. 3 asked the jury whether any of the defendants "engaged in a conspiracy against one or more of the plaintiffs as defined in the charge." The jury answered "yes" as to all of the defendants except defendant Hobby. Interrogatory No. 4 asked whether "such conspiracy was a proximate cause of any damages to the plaintiff." The jury answered this question by checking "no" and, therefore, awarded no damages in response to Interrogatory No. 5.

The jury did not find, therefore, that any of these defendants deprived the plaintiffs of their civil rights. As we have recently stated:

> Under § 1983 conspiracy can furnish the conceptual spring for imputing liability from one to another.... A conspiracy may also be used to furnish the

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27 (5th Cir.1980).

[12] *See Ryland v. Shapiro*, 708 F.2d 967, 976 (5th Cir.1983).

[13] *See Whiting v. Jackson State Univ.*, 616 F.2d 116, 126 (5th Cir.1980); *Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir.), *cert. denied*, _ U.S. _, 104 S.Ct. 3513, 82 L.Ed.2d 822 (1984).

> requisite state action .... Yet, it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient.... Here [the plaintiff] has failed to show any such deprivation. Without a deprivation of a constitutional right or privilege, [the defendant] has no liability under § 1983.[14]

We are unable to read the jury charge to say, as the Farrars contend, that the jury's answers lead to the conclusion that it found the conspirators to have violated the Farrars' civil rights. Absent a finding that the conspirators deprived the Farrars of their civil rights, the jury's finding that a conspiracy existed will not support an award of any damages against the conspirators, compensatory or nominal.[15]

The findings as to Hobby were different. Interrogatory No. 7 instructed the jury that, if it had found that defendant Hobby had not conspired with the other defendants to violate the plaintiffs' civil rights, it should decide whether "Defendant Hobby committed an act ... under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right." The jury answered that Hobby had violated Farrar's civil rights, but also found, in response to Interrogatory No. 8, that his acts were not "a proximate cause of any damages" to Farrar. In response to Interrogatory No. 9, therefore, the jury awarded Farrar no damages for Hobby's acts.

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[14] *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir.1984).

[15] *See id.; see also Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252, 266 (1978).

Even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages.[16] We have awarded nominal damages, not to exceed one dollar, when an infringement of a fundamental right was shown[17] and we have also held that, once a jury has found a violation of a plaintiff's civil rights, it "could not ignore that finding in calculating damages. Violation of [the plaintiff's] constitutional rights was, at a minimum, worth nominal damages."[18] Because the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not to do so when the Farrars so moved in their motion for a new trial.

The Farrars also complain that the court erred in denying a motion for new trial because of its failure to instruct the jury properly on the issues of damages and causation. In this circuit, appellate review of the trial court's denial of a new trial is severely limited, and we will interfere only when the trial court has abused its discretion or failed properly to exercise it.[19] In considering a motion for a new trial, the trial judge is

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[16] *Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252, 266 (1978).

[17] *See, e.g., Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir.1980) (violation of first amendment rights).

[18] *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5th Cir.1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5th Cir.), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir. 1984) (en banc rehearing granted).

[19] *See United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 990 (5th Cir.1984).

free to weigh the evidence,[20] and we will not find that the district court abused its discretion "unless there [was] an 'absolute absence' of evidence to support the jury's verdict."[21] Because the Farrars have chosen not to submit a transcript of the trial to us, we cannot determine whether there is an "absolute absence" of evidence to support the verdict of the jury and, therefore, cannot say that the trial court committed any abuse of discretion.

The Farrars also ask us to sever the damages issues and grant a new trial simply to determine the amount of damages because the interrogatories and the instructions submitted to the jury were erroneous as a matter of law. Although this court may, in a proper case, sever the damages issues,[22] we find no reason to do so in this case. As we have previously noted, the Farrars failed to object to the jury instructions or the special interrogatories on damages. Because we can neither review nor find error as to damages, other than nominal damages, it would be improper for us to sever and to remand the damages issues for a new trial.

For these reasons, the judgment is AFFIRMED IN PART, REVERSED IN PART, and REMANDED for proceedings consistent with this opinion.

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[20] *Id.*

[21] *Id.*

[22] *See Hadra v. Herman Blum Consulting Eng'rs*, 632 F.2d 1242, 1245-46 (5th Cir.1980), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1983, 68 L.Ed.2d 301 (1981); *see also Eximco, Inc. v. Trane Co.*, 748 F.2d 287, 290 (5th Cir.1984).

(Filed January 30, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

The Estate of JOSEPH D. FARRAR and DALE LAWSON FARRAR, Plaintiffs, *versus* CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER, and ARTHUR J. HARTELL, III, Defendants.	§	CIVIL ACTION No. H-75-987

ORDER ON ATTORNEY'S FEES

Pat Smith, Dale Farrar, and Dale Lawson Farrar are awarded attorney's fees of $280,000.00, expenses of $27,932.00, and $9,730.00 of prejudgment interest on the expenses (at 9% after September 1983) as additional costs of court against William P. Hobby, Jr., plus interest at 5.75% per annum from January 23, 1987; Pat Smith, Dale Farrar, and Dale Lawson Farrar recover nothing of Clarence D. Cain, and Arthur J. Hartell, Jr.

Signed on January 30, 1987, at Houston, Texas.

Lynn N. Hughes
United States District Judge

(Filed August 31, 1990)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

The Estate of JOSEPH D. FARRAR and DALE LAWSON FARRAR, Plaintiffs, *versus* CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER, and ARTHUR J. HARTELL, III, Defendants.	§	CIVIL ACTION No. H-75-987

MEMORANDUM ON ATTORNEYS' FEES

Dale Farrar has applied for allowance of attorneys' fees and expenses incurred in the prosecution of a civil rights suit against Clarence D. Cain, Ruth Urmy, William P. Hobby, Jr., Raymond W. Vowell, Lonnie A. Gruver, and Arthur J. Hartell, III. A six-week jury trial resulted in a finding that only Hobby had deprived the Farrars of their civil rights. Nominal damages were awarded after an appeal.

The court, after an evidentiary hearing, granted Farrar's petition for $280,000 of attorneys' fees. On the defendant's motion, a rehearing was held.

Lieutenant Governor Hobby, through the Attorney General, presented seven hours of evidence and hundreds of pages of briefing but has not rebutted the Farrars' original showing that they prevailed at trial and on appeal or that the award of $280,000 was unreasonable. The motion to reconsider will be denied. These findings are supplemental to those in the record.

Facts.

The Farrars sued a Liberty County attorney, a Texas district judge, two public welfare department officials, and Lieutenant Governor Hobby for civil rights violations, claiming that their actions resulted in the destruction of Dr. Farrar and his son's reputations and the permanent closure of their school, Artesia Hall. The defendants collectively closed Artesia Hall, a home for juvenile delinquents, in an *ex parte* proceeding. On June 22, 1973, after a highly-publicized inspection of the school, Hobby demanded the closing of Artesia Hall. Although Dale Farrar was located in a jail cell adjoining the Liberty County court house and could have been summoned, the Hall was closed in a 20-minute *ex parte* hearing at which Hobby was present.

The jury found that the defendants were not entitled to qualified immunity because they had acted outside the scope of their official responsibilities. The Farrars showed that indictments against them were obtained by holding over a grand jury on which a member of the Liberty County Department of Public Welfare deliberated and by supplying fabricated evidence to the grand jury. Also, they argued that Artesia Hall was closed on the pretense that the plaintiffs had not obtained a license from the Department of Public Welfare. The defendants who closed the school had,

however, conspired to make compliance with the licensing requirements impossible for Artesia Hall. Apparently, the defendants were embroiled to such a degree in pursuit of a politically popular campaign against child abuse that they deprived the target of their campaign of important procedural due process rights, which, until the outcome of this suit, resulted in the professional ruin of the Farrars.

Although Dale Farrar was awarded only nominal monetary damages, he represents that the suit satisfied his main objective of clearing his and his father's reputation by showing that the defendants had abused their public positions when they arrested Joseph Farrar for murder and attempted to prosecute both him and his father without cause.

Background.

The Farrars' suit was filed in 1975, but soon it was dismissed by the district court. The court of appeals vacated and remanded the case. Attorneys' fees for both parties escalated to exorbitant levels in part because the case was twice appealed, took 10 years to resolve, and required a six-week trial, which was complicated by the death of Joseph Farrar, a plaintiff, and the plaintiffs' chief witness. Doctor Farrar died just before trial in April 1983, necessitating the gathering of additional evidence.

It is perhaps because of Farrar's untimely death that large actual monetary damages were not proved and a take nothing judgment was entered. The jury instructions made it difficult to discern exactly what the jury found, but at least all of the defendants, with the exception of Hobby, were found to have conspired

against the Farrars. The plaintiffs appealed the judgment, and the court of appeals reversed the trial court's entry of a take nothing judgment against Hobby and remanded the case for the entry of nominal damages. *Farrar v. Cain,* 756 F.2d 1148 (5th Cir. 1985). The district court ordered that each party bear its own costs even though the jury found that Hobby had violated the Farrars' civil rights; this ruling was also reversed. An interim application for attorneys' fees had been filed by the Farrars in October 1984 and was amended in 1985 and 1987.

Preclusion.

Hobby argues that this proceeding is precluded by the trial court's original ruling at the trial. Although Hobby never appealed the verdict that he had violated the Farrars' civil rights, he maintains that he did nothing wrong, and, had he known he would have been liable for attorneys' fees, he would have appealed. Hobby also argues that since the plaintiffs appealed the court's order and appeared "down cast" when the verdict was delivered, they perceived themselves as the losing party.

Hobby's argument that this litigation is precluded by the trial judge's order on November 10, 1983, that each party bear its own costs fails. After the November 1983 order the plaintiffs filed an application for reimbursement. The court, in a February 1985 opinion, stated that because "the element of success is partially complete"—a decision on attorneys' fees was "premature" then, but it could be reurged after the outcome of the appeal. By reversing the district court's holding on damages, the court of appeals vacated any apparent ruling on attorneys' fees.

The entry of nominal damages supports a finding that the plaintiffs prevailed at trial.

42 U.S. C. § 1988.

The statute provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." In enacting § 1988 Congress decided that the public as a whole has an interest in the vindication of the rights conferred by the civil rights statutes. Rather then placing the sole task of enforcing these rights on a government agency, it was decided that they would be more vigorously enforced if plaintiffs were compensated for their costs in successful suits.

It is undisputed that one does not have to achieve a complete and unblemished victory after a trial on the merits to be a prevailing party. This would discourage plaintiffs from bringing related claims that they might lose on and thus not receive fees for winning on a major issues. Problems arise, however, in determining who the prevailing party is when the plaintiff does not achieve all the relief requested in his suit. The legislative history of § 1988 does not provide a definite answer on the proper standard for setting a fee award where the plaintiff has not succeeded on all claims asserted. The Supreme Court has placed a great deal of discretion in the hands of the trial court. "A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness." *Blum v. Stenson*, 465 U.S. 886, 902, 104 S. Ct. 1541, 1550 n. 19 (1984).

Last term the United States Supreme Court, unanimously put to rest the central issue test previously

endorsed by the fifth and the eleventh circuits and stated what the district court must look for when seeking the prevailing party. *Texas State Teachers Assoc. v. Garland Independent School Dist.*, _ U.S. _, 109 S. Ct. 1486 (1989).

> If the plaintiff has succeeded on "any significant issue in the litigation which achieve[d] some of the benefit the parties sought in bringing suit" the plaintiff has crossed the threshold to a fee award of some kind. . . . at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not the availability of a fee award *vel non*.

Garland, U.S. at ___, 109 S. Ct. at 1493 *(quoting Nadeau v. Helgemoe*, 581 F. 2d 275, 278-79 (1st Cir. 1978)); *see Shipes v. Trinity Industries, Inc.*, 883 F.2d 339, 343 (5th Cir. 1989); *Rendon v. AT&T Technologies*, 883 F.2d 388, 399 (5th Cir. 1989).

Applying this new standard to this case, Farrar is entitled to a fee award. A constitutional violation by a public official is no less repugnant to our system simply because the injury is not redressable by money damages. This case is not, as Hobby asserts, a *"de minimis* technical victory." The importance of Farrar's vindication punctuates the triumph of our American spirit and a "violation of constitutional rights is never

de minimis, a phrase meaning so small or trifling that the law takes no account of it." *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988).

Nominal Damages.

The award of nominal damages meets the test announced in *Garland.*

> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, . . . we believe that the denial of due process should be actionable for nominal damages without proof of actual injury. . . . By making the deprivations of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.

Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 1054 (1978).

Even under the arguably less generous central issue test the fifth circuit has held "an attorneys' fees award may be supported by an award of nominal damages since the successful claim serves to vindicate constitutional rights." *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *McNamara v. Moody*, 606 F.2d 621 (5th Cir.1979); *cert. denied*, 447 U.S. 929, 100 S. Ct. 3028 (1980); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980). In *Familias Unidas*, the fifth circuit reversed the district court and used the central issue test to award attorneys' fees. The

facts closely mirror the facts in the instant case and even the higher hurdle of the central issue test allowed an award of attorneys' fees in a case where actual damages are sought but only nominal damages are awarded. The plaintiffs in *Familias Unidas* challenged § 4.28 of the Texas Education Code. The fifth circuit twice reversed the district court's dismissal and rendered the challenged statute unconstitutional awarding the plaintiffs nominal damages.

> Though Familias and Torrez have each been less than completely successful — Familias having been refused injunctive relief by the prior panel, 544 F.2d at 186-188, and Torrez having been refused actual damages here — both prevailed with respect to the central issue of the case, the constitutionality of section 4.28. *Iranian Students Association v. Edwards,* 604 F.2d 352, 353 (5th Cir. 1979) (proper focus is whether plaintiff is successful on central issue). The granting of declaratory relief and nominal damages, based on our having found section 4.28 to be unconstitutional, adequately justifies an award of attorney's fees to plaintiffs as prevailing parties under the statute.

Id. at 405-06. Even though the plaintiffs were awarded only nominal damages the fifth circuit remanded the case for an award of attorneys' fees for the entire case. "[w]e remand to the district court solely for receipt and evaluation of plaintiff's affidavits and determination of an award of reasonable fees and costs for the entirety of this litigation, including those incurred on this remand." *Id.* at 407.

Other circuits, previous to *Garland,* have also found an award of nominal damages can support an award of attorneys' fees. *Bilbrey v. Brown,* 738 F.2d 1462, 1472 (9th Cir. 1984); *Scofield v. City of Hillsborough,* 862 F.2d 759, 766 (9th Cir. 1988); *Coleman v. Turner,* 838 F.2d 1004 (8th Cir. 1988) (reversing district courts denial of attorney's fees where nominal damages awarded); *Smith v. Debartoli,* 769 F.2d 451 (7th Cir. 1985), *cert. denied,* 475 U.S. 1067, 106 S. Ct. 1380 (1986) (holding it was in the discretion of the district court to allow attorney's fees in case where nominal damage is awarded, but fees were not awarded because the plaintiff was not an attorney). The fourth circuit has found that no award of damages, nominal or otherwise, is a prerequisite to an award of attorney's fees.

> [A] finding of liability on a § 1983 claim need not be supported by a monetary damage award for the prevailing party to reap the legal benefits of having won on the merits. A plaintiff in a § 1983 action may recover attorneys' fees under 42 U.S.C. 1988 and costs under rule 54 of the Federal Rules of Civil Procedure as long as he or she is designated the prevailing party. A monetary damage award or equitable relief is not required before a plaintiff or a defendant in a § 1983 suit may be treated as the prevailing party for the purpose of awarding costs and attorney's fees. . . . An award of $1.00 in damages in this case is not necessary in order for Ganey to be labeled the prevailing party.

Ganey v. Edwards, 759 F.2d 337, 339-40 (4th Cir.

1985). (Plaintiff won the verdict after a five-day trial but was awarded no damages and lost an appeal for nominal damages and equitable relief).

The most generous formulation comes from the third circuit and the case of *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F.2d 1161 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1052, 103 S. Ct. 1499 (1983). The court in *Wilmington* allowed the award of attorneys' fees in a case where the plaintiff lost the case, but a court ordered HEW investigation during the course of the litigation effectuated some of the plaintiffs goals. To come to this conclusion, allowing extra-lawsuit victory to ameliorate litigation defeat, the court enunciated the following standard: "It is settled law in this circuit that as long as a plaintiff achieves some of the benefits sought in *initiating* a lawsuit, even though the plaintiff does not ultimately succeed in securing a favorable judgment, the plaintiff can be considered the prevailing party for purposes of a fee award." *Id.* at 1166 (emphasis supplied); *See Bagby v. Beal*, 606 F.2d 411 (3rd Cir. 1979). A thorough discussion of this question can be found in *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897 (3rd Cir. 1985), which reaffirmed the lenient rule: "a plaintiff may be a prevailing party even though judgment was actually awarded in favor of the defendant." *Id.* at 912.

Means and Ends.

Requesting monetary damages in a civil rights suit is a means to an end; that the substantial damages that are requested are not ultimately awarded does not mean that important constitutional rights have not been vindicated. "It is not necessarily significant that a

prevailing plaintiff did not receive all the relief requested." *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1941 n.11 (1983). Undoubtedly, failure to obtain monetary damages was a disappointment to Farrar, and that may explain his attorney's look of disappointment when the verdict was rendered, but this was not the sole objective or the underlying reason for the suit. The facial expression of counsel has never been held to be a criterion of who prevailed. Hobby cannot belittle the important victory secured by Dale Farrar of clearing his family name.

Hobby's characterization of himself as the victor because the jury did not find him financially liable is misplaced. Civil rights claims are among the hardest lawsuits to bring; most are dismissed by the courts before trial, as was this case initially. Obtaining the stance of "prevailing party" is measured differently in civil rights suits than in personal injury or other types of cases and is not synonymous with a money judgment. Including in their case a demand for huge money damages should not overshadow equally important results secured for both the plaintiffs and the public since it is successful litigants like the Farrars who discourage state officials from overstepping the bounds of responsibility entrusted to them. Awarding attorneys' fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions. Unless § 1988 is construed in the manner described in *City [of] Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 (1986), officials will not be constrained to act in consonance with the Constitution when the monetary award is likely to be small.

Although abrupt policy changes are not likely to follow as a result of this order, the cumulative effect of meritorious civil rights litigation eventually deters impermissible conduct by governmental officers and the expenditure of thousands of taxpayer dollars stubbornly to defend that misconduct. An award of reasonable attorneys' fees encourages competent attorneys to accept cases of plaintiffs who have been seriously wronged and makes the judgment fully compensatory.

Litigation over attorneys' fees alone in the Farrars' suit has spanned two years, consumed hours of oral argument, generated over 400 pages of briefs, prompted Hobby to hire a former federal judge for counsel, and caused the state to buy a 400-page transcript of the trial, all in an effort to show that the plaintiffs' significant relief did not rise to the level of "prevailing on the central issue." In short, the local case law has resulted in what *Hensley* directs should not happen: the request for attorney's fees turns into a second major litigation.

Reasonable Fees.

After determining whether the plaintiff was the prevailing party, the fee requested must be reasonable. The litigation at issue has spanned ten years. The lead trial attorney for the plaintiff spent almost 1,000 hours preparing this case for trial, and by 1987, over 2,000 hours. Hobby has submitted some records of their legal expenses defending the suit. Their total reported expenses for just five years, from January 1983 to August 1985, came to $151,954. "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *City of Riverside,* 477 U.S. 561,

580, 106 S. Ct. 2686, 2697, n. 11 (1986) *(quoting, Copeland v. Marshall,* 641 F.2d 880, 904 (D.C. Cir. *1980)(en banc)).* A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the other litigation as a whole, or more accurately, the fee in that event is limited to the charges attributable to that issue. The Farrars' suit was not as much a case about money — although this issue was inextricably entwined with the substantive claims — as it was about the legality of the actions of six state officials. Hobby argues that even if the Farrars prevailed, their fee should be reduced because the jury found only one defendant had violated their rights and no damages were secured. The Supreme Court has rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Hensley,* 461 U.S. at 435, 103 S. Ct. at 1940, n. 11. Dividing the successful issue by the original number of defendants or claims reflects no reality of compensation or litigation.

In passing the Act, the legislative history indicates that Congress approved the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974) as guidelines for determining the amount of fees to be awarded. These factors are: (1) the time and labor required, (2) novelty and difficulty of the questions, (3) level of skill requisite to perform the legal service properly, (4) preclusion of other employment by the attorney's acceptance of the case, (5) customary fee, (6) type of fee arrangement, either fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) amount involved and the results obtained, (9) experience, reputation, and ability of the attorneys, (10) undesirability of the case,

(11) nature and length of the professional relationship with the client, and (12) amount of awards in similar cases.

The time spent is undisputed. (1)

Application.

On the second of the *Georgia Highway Express* factors, the novelty and difficulty of the case, it is clear that it was a difficult case in a changing area of the law that has always been difficult. (2)

The skill required was serious, and that it precluded other work is clear. (3, 4).

The customary fee is consistent with the application, so that is a neutral factor. (5)

Whether it is fixed or contingent shifted from time to time, but that is considered a positive factor in the application simply because of the necessity that they advanced considerable cost, recovery of which was always contingent and riskily so. (6)

The time constraints were normal. (7) Time constraints in litigation are always harrowing, but there were none in this case that made it extraordinarily difficult, so that is a neutral factor.

The amount involved and results obtained factor was divide into two. The amount involved, the $17 million, has been disregarded except as lawyer hyperbole. How much was involved is unknown and will be treated as a negative factor because the amount involved turned out not to be critical. (8a)

The second half, results obtained, the results obtained are significant, but possibly less clearly than

the Farrars wanted. That will be treated as a neutral factor. The finding of vindication is significant and especially to people who must continue to live and do business in a mostly rural Texas county. (8b)

The standing of counsel is a positive factor. There is no dispute. Waggoner Carr has been Speaker of the Texas House of Representatives, Attorney General of Texas, and is a distinguished trial lawyer. (9)

The disposition of the case is a positive factor. The nature of the case is a negative factor. The attorney and client had a casual relation at the beginning. (11) Similar awards is a neutral factor. (12)

Despite the fact that there are six positive, two negative, and four neutral factors the award will not be increased.

Carr's hourly rates are entirely reasonable. The plaintiffs will be awarded $280,000 attorney's fees and $27,932 costs.

At the original fee hearing, the Farrars called the trial judge (who has returned to private practice since the trial) as their expert witness. Based on his experiences both as a trial lawyer and federal judge, Mr. Robert O'Conor is well qualified to testify about the process of calculating an appropriate fee in a civil rights case; however, none of this testimony was employed by the court to impeach the record of the preappeal proceedings. The result has not been affected by the appearance of two distinguished former members of this court, neither Robert O'Conor as a witness for the plaintiffs nor Finis Cowan as local counsel for the defendant. Prior public service is not a disqualification.

When large attorney's fees are awarded following a small award for actual damages, detractors of civil rights litigation predictably scream "windfall." There is no windfall. Every cent of the attorney's fee was earned by intelligent, difficult work by the lawyers. That they should be paid is no more a windfall than the assistant attorney general's salary was a windfall to him. He lost the case and still had his fee paid by the public.

The government grows more complicated, more powerful, more pervasive. The constitutional decision made after the Civil War to leave the vindication of all of our rights up to individual litigants is more important now than it was then, and that the plaintiffs can trace no revolution in public administration by reason of this case does not diminish the contribution that is made by people who force public officials to comply with the law. It is not just the family name of the Farrars and the protection of the Farrars from an excessive government that has been accomplished here. The protection extends to all Americans.

It is unfortunate that this system of civil justice has taken fifteen years to resolve this matter. There will be prejudgment interest on the fee and cost award based on the federal postjudgment rate since the oral rendition of this award.

This motion to reconsider will be denied.

Signed on August 22, 1990, at Houston, Texas.

Lynn N. Hughes
United States District Judge

(Filed August 31. 1990)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

The Estate of JOSEPH D. FARRAR and DALE LAWSON FARRAR, Plaintiffs, *versus* CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER, and ARTHUR J. HARTELL, III, Defendants.	§	CIVIL ACTION No. H-75-987

ORDER DENYING RECONSIDERATION OF ATTORNEYS' FEES

The defendants' motion for reconsideration of the award of attorneys' fees is denied.

Signed on August 22, 1990, at Houston, Texas.

Lynn N. Hughes
United States District Judge

(Filed September 17, 1991)

ESTATE OF Joseph D. FARRAR
and Dale Lawson Farrar,
Plaintiffs-Appellees,

v.

Clarence D. CAIN, et al., Defendants,

and

William P. Hobby, Jr., Defendant-
Appellant.

No. 90-2830.

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1991.

In § 1983 action, the United States District Court for the Southern District of Texas entered summary judgment for defendants, and plaintiffs appealed. The Court of Appeals, 642 F.2d 86, vacated and remanded. On remand, the District Court, Robert O'Conor, Jr., J., entered judgment for defendants and plaintiffs appealed. The Court of Appeals, 756 F.2d 1148, affirmed in part, reversed in part, and remanded. Plaintiffs subsequently filed application for attorney's fees. The District Court, Lynn N. Hughes, J., entered order awarding plaintiffs attorney's fees, and defendants appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that plaintiffs were not "prevailing parties" under statute allowing for award of attorney's fees to prevailing parties.

Reversed.

Reavley, Circuit Judge, dissented with opinion.

Appeal from the United States District Court for the Southern District of Texas.

Before REAVLEY, HIGGINBOTHAM and DUHE, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Joseph and Dale Farrar brought a § 1983 suit against then-Lieutenant Governor William Hobby, among others, alleging that Hobby had participated in a conspiracy to deprive the Farrars of their civil rights. At trial the Farrars sought only money--$17 million in damages. The jury found Hobby innocent of any conspiracy, but nonetheless found that he had violated the Farrars' civil rights. Yet the jury found no damages. On remand, the trial court awarded the Farrars $1 in nominal damages and, finding the Farrars to be the "prevailing parties" under § 1988, awarded them over $300,000 in attorney's fees and expenses. We are not persuaded that the Farrars were the prevailing parties under § 1988. We reverse the fee award.

I

Joseph and Dale Farrar at one time operated Artesia Hall, a facility for troubled teens, in Liberty County, Texas. After the death of an Artesia Hall student in 1973, a Liberty County grand jury returned a murder indictment against Joseph Farrar. The indictment charged Farrar with willfully failing to administer proper medical treatment to the student and failing to timely provide for her hospitalization. Shortly thereafter, the state of Texas, acting through its

Attorney General, obtained a temporary injunction closing Artesia Hall.

William Hobby, then Lieutenant Governor, played some role in the events leading to the closing of Artesia Hall. Upon learning of the indictment through the media, and discussing the situation with State Representative John Whitmire, Hobby issued a press release criticizing the Texas Department of Public Welfare and its licensing procedures. He also contacted Raymond Vowell, the director of the TDPW, and urged him to investigate Artesia Hall. Several days later, Hobby met with Governor Dolph Briscoe and accompanied Briscoe on an inspection of Artesia Hall. Finally, he attended the temporary injunction hearing with Briscoe, but did not personally testify, and spoke to reporters after the hearing.

The murder indictment was eventually dismissed. Joseph Farrar later filed this suit against Hobby, Judge Cain, County Attorney Hartel, and the director and two employees of the Texas Department of Public Welfare, seeking injunctive relief and monetary damages under 42 U.S.C. §§ 1983 and 1985. Later amendments to the complaint added Farrar's son, Dale, as a plaintiff, dropped the claim for injunctive relief, and increased the requested damages to $17 million. The Farrars alleged that the defendants violated their civil rights by, among other things, malicious prosecution aimed at closing the school, thereby depriving them of the right to practice their livelihood and profession. They also alleged a conspiracy to violate their civil rights.

The district court granted the defendants' motion for summary judgment on February 23, 1981, but a panel of this court vacated the order. Joseph Farrar

died on February 20, 1983, and the court granted a motion to substitute the co-administrators of his estate, Pat Smith and Dale Farrar, as plaintiffs. On August 15, 1983, the case was tried to a jury on ten special interrogatories. The jury found that none of the defendants were immune from liability, that all of the defendants except Hobby, engaged in a conspiracy against the plaintiffs, that the conspiracy was not the proximate cause of any injury, that Hobby "committed an act or acts under color of state law that deprived Plaintiff Joseph Farrar of a civil right," and that Hobby's acts were not the proximate cause of any injury. The district court entered judgment in accordance with the jury's findings on November 10, 1983.

On appeal, in an opinion dated April 8, 1985, this court affirmed in part and reversed in part. We affirmed the district court's failure to award nominal damages against the defendants engaged in the conspiracy because, to establish liability under § 1983, "it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient."[1] However, because the jury found that Hobby committed a civil-rights violation, we remanded for the entry of nominal damages against him.[2]

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[1] *Farrar v. Cain*, 756 F.2d 1148, 1151 (5th Cir. 1985) (quoting *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir.1984)).

[2] *Id.* at 1152 (citing *Carey v. Piphus*, 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978); and *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5th Cir.1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5th Cir.), *aff'd in part and rev'd in part*, 739 F.2d 993 (5th Cir.1984) (en banc rehearing granted)).

The Farrars subsequently filed an application for attorney's fees under 42 U.S.C. §§ 1988, seeking to recover $248,362.50 in fees and $27,976.74 in expenses. After a hearing, the district court entered an order awarding "Pat Smith, Dale Farrar, and Dale Lawson Farrar" $280,000.00 in fees, $27,932.00 in expenses, and prejudgment interest, against Hobby only. The court denied reconsideration of the fee award, and Hobby now appeals to this court. We hold that the Farrars are not "prevailing parties" under § 1988 and therefore reverse.

II

Section 1988 provides, in relevant part, as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.[3]

In several recent cases, the Supreme Court has articulated standards for determining whether a party has prevailed for purposes of recovering attorney's fees under § 1988.[4] In *Garland*, rejecting the "central

[3] 42 U.S.C.A. § 1988 (West 1981) (emphasis added).

[4] *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988); *Hewitt v. Helms*, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

issue" test, which this circuit had applied,[5] the Court stated that "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind."[6] The Court went on to say that,

> at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status.[7]

The Court also noted that it had first laid this "floor" prevailing-party requirement in *Hewitt*.

Hewitt was an inmate's § 1983 suit against prison officials. Following a prison riot in Pennsylvania, officials "charged" inmate Aaron Helms for allegedly striking an officer. Relying solely on the hearsay testimony of the charging officer, a prison committee found Helms guilty. Helms sued claiming denial of due process. The prison officials contested the

[5] *Texas State Teachers Assoc. v. Garland Indep. School Dist.*, 837 F.2d 190 (5th Cir.1988), *rev'd*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989).

[6] *Garland*, 109 S.Ct. at 1493 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)). In *Hensley v. Eckerhart*, 103 S.Ct. at 1939 (1983), the Court applied the same standard.

[7] *Id.* (citations omitted).

constitutional claim and invoked qualified immunity. The district court granted summary judgment for the defendants but did not decide the immunity issue. However, the Third Circuit, finding that Helms was denied due process, reversed and instructed the trial court to enter summary judgment for Helms unless the officials could establish an immunity defense. On remand the district court granted summary judgment for the defendants on the basis of qualified immunity.

The Supreme Court held that Helms was not a prevailing party:

> Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail .... Helms obtained no relief. Because of the defendants' official immunity he received no damages award. No injunction or declaratory judgment was entered in his favor.[8]

The Court then made the following distinction between "a vindication of rights" and "some relief on the merits:"

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces--the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant.... The real value of the judicial pronouncement--what makes it a proper

[8] *Hewitt*, 107 S.Ct. at 2675.

> resolution of a "case or controversy" rather than an advisory opinion--is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* .... As a consequence of the present lawsuit, Helms obtained nothing from the defendants. The only "relief" he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law in an otherwise unfavorable opinion.[9]

The Court applied the *Hewitt* principles in *Rhodes v. Stewart.*[10] In *Rhodes* two inmates in an Ohio prison filed a § 1983 complaint, alleging that, by refusing to permit the inmates to subscribe to a magazine, prison officials had violated the inmates' First and Fourteenth Amendment rights. The district court eventually decided in favor of the plaintiffs, ruling that the officials had not applied the proper procedures and standards. But by the time the district court issued its decision, one of the inmates had died and the other had been released. The district court awarded attorney's fees to the plaintiffs. The court of appeals construed the district court's decision as a declaratory judgment and therefore upheld the fee award.

The Supreme Court reversed the fee award on the ground that, because the plaintiffs had won no relief from the defendants, *Hewitt* was controlling:

[9] *Id.* 107 S.Ct. at 2676 (emphasis in original).

[10] 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988).

> A declaratory judgment ... is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff. In this case there was no such result. A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order.... The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever. In the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence is not entitled to an award of attorney's fees.[11]

Thus, after *Hewitt, Rhodes,* and *Garland,* to qualify as a prevailing party, a plaintiff must show that he won at least some relief from the defendant, that the outcome of the suit changed the legal relationship between the parties, and that the plaintiff's success was not a *de minimis* or technical victory.

III

We are persuaded that the Farrars were *not* prevailing parties for the purposes of § 1988, and we therefore reverse. The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal

[11] *Rhodes,* 109 S.Ct. at 203-04.

victories are made."[12] Of course, as the district court emphasized, the Farrars did succeed in securing a jury-finding that Hobby violated their civil rights and a nominal award of one dollar. However, this finding did not in any meaningful sense "change the legal relationship" between the Farrars and Hobby.[13] Nor was the result a success for the Farrars on a "significant issue that achieve[d] some of the benefit the [Farrars] sought in bringing suit."[14] When the sole relief sought is money damages, we fail to see how a party "prevails" by winning one dollar out of the $17 million requested. Furthermore, even if the Farrars could be seen as victors, given their singular objective of money damages, surely theirs was "a technical victory... so insignificant, and ... so near the situations addressed in *Hewitt* and *Rhodes,* as to be insufficient to support prevailing party status."[15]

In *Hewitt* the plaintiff secured a judicial determination that his constitutional rights had been violated. But since he was unable to get any form of relief from the defendants--owing to the defendants' governmental immunity--the plaintiff was deemed not to be a prevailing party. The same principle was applied in *Rhodes.* There the Court said that, although the plaintiffs won a declaratory judgment stating that the defendants had violated constitutional rights, the plaintiffs were not prevailing parties under § 1988

[12] *Hewitt,* 107 S.Ct. at 2676.

[13] *Garland,* 109 S.Ct. at 1493.

[14] *Id.*

[15] *Id.*

because they received no benefit from the judgment. "In the absence of relief a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence is not entitled to an award of attorney's fees."[16] Likewise, the Farrars failed to meet that § 1988 threshold, because they too failed to win relief.

We do not diminish the significance of a finding of a constitutional violation. In *Carey v. Piphus*,[17] stressing "the importance to organized society that procedural due process be observed," the Supreme Court held that the denial of due process is actionable for nominal damages even without proof of actual injury.[18] Moreover, as the district court noted, we have held that "[a] violation of constitutional rights is never *de minimis*," in the sense that a constitutional violation is never "so small or trifling that the law takes no account of it."[19] That holding is no less valid today. Rather, we hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more. We

[16] *Rhodes*, 109 S.Ct. at 204.

[17] 435 U.S. 247, 266-67, 98 S.Ct. 1042, 1053-54, 55 L.Ed.2d 252 (1978).

[18] Although the Court spoke to the issue indirectly, *Carey*, 435 U.S. at 257 n. 11, 98 S.Ct. at 1049 n. 11, it did not answer the question whether a plaintiff who wins only nominal damages may recover attorney's fees.

[19] *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988) (citing *Carey*).

must--under *Garland*,[20] *Hewitt*, and *Rhodes*--inquire into whether the plaintiff's victory, as measured by the relief actually obtained, was merely a *de minimis* or technical success.[21]

Our holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[22] The most recent of those opinions, and the one whose reasoning and holding are most obviously contrary to our own, is *Ruggiero v. Krzeminski*.[23]

In *Ruggiero*, police officers conducted a search of

[20] *Garland*, 109 S.Ct. at 1493 ("Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied.") (citation omitted).

[21] In a related argument, the district court cites three Fifth Circuit opinions that supposedly stand for the proposition that the award of nominal damages will alone support a § 1988 attorney's-fee award. *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir.1982); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir.1980); *McNamara v. Moody*, 606 F.2d 621 (5th Cir. 1979). All three cases, however, were decided before and therefore were not governed by the Supreme Court's decisions in *Hewitt*, *Rhodes*, and *Garland*.

[22] *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir.1991), *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir.1988); *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n. 2 (10th Cir. 1987) (en banc); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir.1987). *But see Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) *(dicta)*. We do not lightly create a conflict. This opinion was circulated to the entire court as required by the court's policy. No member of the court has requested en banc consideration.

[23] 928 F.2d 558 (2d Cir.1991).

the Ruggieros' home and seized certain items. The Ruggieros brought § 1983 suit against the officers, alleging, among other things, that the search and the seizure were illegal. The jury found that the Ruggieros had not consented to the search. It also found, however, that the Ruggieros suffered no compensatory damages as a result of the illegal search. The trial judge directed the award of nominal damages in the amount of one dollar. The judge also determined that the Ruggieros were the prevailing parties under § 1988 and, accordingly, awarded them attorney's fees.

On appeal the Second Circuit, citing the Supreme Court's opinion in *Carey* as well as this court's opinion in *Farrar I*, approved the nominal-damage award. The court also affirmed the attorney's-fee award and rejected Officer Krzeminski's argument that the Ruggieros were not prevailing parties within the meaning of § 1988 because of their limited success at trial. Quoting from *Garland*, the court held that the Ruggieros were indeed prevailing parties:

> In a case such as the case at bar, where the claims arise out of a common core of facts and involve related legal theories, success may be assessed by examining whether plaintiffs can "point to a resolution of the dispute which changes the legal relationship between [them] and the defendant[s]."
>
> Based on the Supreme Court's "generous formulation," we think it clear that the Ruggieros were "prevailing parties" as required by section 1988. The jury's determination that appellants' fourth and fourteenth amendment rights were violated by the search conducted by the Officers assuredly is significant. Simply because the jury found that the Ruggieros did not establish their claims in all respects does nothing to lessen the significance, or importance, of the Ruggieros' success. *Although no compensatory damages were awarded, the jury's determination "changes the relationship" between the Ruggieros and the Officers in that a violation of rights had been found."*[24]

Thus the Second Circuit holds that when a jury determines that a constitutional violation has occurred--even when the plaintiff seeks only compensatory relief[25] and the jury finds no damages whatsoever--the legal relationship between the plaintiff and the defendant has changed and the plaintiff has prevailed.

Other circuits have reached essentially the same conclusion as the Second Circuit: that a finding of a violation and an award of nominal damages--unaccompanied by other relief--is sufficient to create prevailing party status.[26] Some of those cases, however, were decided before *Rhodes* or even before *Hewitt*. *Eg., Nephew* (decided before *Rhodes); Garner* (decided before *Hewitt*). The cases decided

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[24] *Garland*, 109 S.Ct. at 1493 (emphasis added).

[25] The opinion does not indicate that the Ruggieros sought anything other than monetary damages. In any event, the opinion makes clear the Ruggieros won no relief from the defendants.

[26] *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir.1988); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir.1988); *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n. 2 (10th Cir.1987) (en banc); *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987). *But see Spencer v. General Electric Co.*, 894 F.2d 651 (4th Cir. 1990) *(dicta)*.

after *Hewitt* and *Rhodes* do not discuss or even refer to either case. Instead, the courts rely on pre-*Hewitt* and pre-*Rhodes* circuit-court decisions.[27] Even *Ruggiero* does not discuss or cite *Hewitt* or *Rhodes;* it relies instead on the Supreme Court's opinions in *Garland* and *Hensley*.

In any event, applying the principles set forth in *Hewitt* and applied in *Rhodes,* we are compelled to disagree with the position taken by these circuits, especially as that position is stated in *Ruggiero.* In *Hewitt* the court of appeals determined that the plaintiff's constitutional rights had been violated. But on remand the trial court denied all relief, as the defendants were protected because of official immunity. The Supreme Court held that the plaintiff was not the prevailing party, because "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated. The same moral satisfaction presumably results from any favorable statement of law in an otherwise unfavorable opinion."[28] After *Hewitt* but before *Rhodes,* one might have distinguished between a mere "favorable statement of law" and an actual judgment declaring a rights violation. In *Rhodes,* however, the Court extended the *Hewitt* principle to situations in which the plaintiff has secured such a judgment but has failed to win relief from the

[27] *Coleman,* 838 F.2d at 1005 (citing *Smith v. DeBartoli,* 769 F.2d 451 (7th Cir.1985), *cert. denied,* 475 U.S. 1067, 106 S.Ct. 1380, 89 L.Ed.2d 606 (1986)); *Scofield,* 862 F.2d at 766 (citing, *inter alia, Bilbrey v. Brown,* 738 F.2d 1462, 1472 (9th Cir.1988)).

[28] *Hewitt,* 107 S.Ct. at 2676.

defendant. The Court stated that "[a] declaratory judgment ... is no different from any other judgment. It will constitute relief, for the purpose of § 1988, if, and only if, it affects the behavior of the defendant towards the plaintiff."[29]

That a court or jury finds a violation does not, by itself, create prevailing-party status. Rather, to be a prevailing party, a plaintiff must secure a decision that changes the legal relationship between the parties in a way that alters the defendant's behavior toward the plaintiff and that secures some of the relief sought by the plaintiff in bringing the suit. The Farrars have won no such victory.

We reverse the district court's attorney's-fee award and hold that the parties shall bear their own costs.

REVERSED.

REAVLEY, Circuit Judge, dissenting:

While I have difficulty understanding the justification for the finding that Governor Hobby violated plaintiffs' civil rights, that issue has been foreclosed. The majority holds that where plaintiff obtains only nominal damages for his constitutional deprivation, he cannot be considered the prevailing party. I disagree and do not read *Hewitt, Rhodes* and *Garland* to go so far. The plaintiffs prevailed in their claim although the amount of their benefit was only nominal. I do not regard that result as insignificant. I would, however, order reconsideration of the amount of the fee under these circumstances.

[29] *Rhodes,* 109 S.Ct. at 203.

(Filed September 17, 1991)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2830

D.C. Docket No. CA H 75 0987

ESTATE OF JOSEPH D. FARRAR and
DALE LAWSON FARRAR,

Plaintiffs-Appellees,

versus

CLARENCE D. CAIN, ET AL.,

Defendants,

and

WILLIAM P. HOBBY, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

Before REAVLEY, HIGGINBOTHAM and DUHE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the District Court's attorney's-fee award in this cause is reversed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

September 17, 1991

ISSUED AS MANDATE: October 25, 1991

Reavley, Circuit Judge, dissents.

STATUTORY PROVISIONS

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees

. . . In any action or proceeding to enforce a provision of sections 1977, 1978, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-83, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(2)

No. 91-990

In The

Supreme Court of the United States

October Term, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY JR.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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January 1992

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QUESTION PRESENTED

When the sole object of a suit is to recover money damages, is a plaintiff who recovers only one dollar as nominal damages a "prevailing party" within the meaning of 42 U.S.C. § 1988 and this Court's decision in *Garland*?*

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* *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989).

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STATEMENT OF THE CASE

In June 1975, Joseph Davis Farrar brought this civil rights action for money damages and injunctive relief under 42 U.S.C. §§ 1983 and 1985. Named as defendants were respondent, William P. Hobby Jr., then the lieutenant governor of Texas, two elected officials of Liberty County, Texas, and three state employees. Farrar charged the defendants with engaging in various conspiracies designed to deprive him illegally of his ownership and operation of Artesia Hall, a facility for minors suffering from drug-related, academic, and disciplinary problems. Later amendments added Dale Lawson Farrar, Joseph Farrar's son and an employee at Artesia Hall, as plaintiff, dropped the demand for injunctive relief, and requested as relief $2.7 million in monetary damages only. Joseph Farrar died in 1983 and Petitioners, the co-administrators of his estate, were substituted as plaintiffs. A third and final amended complaint continued to request only monetary damages but raised that request to $17 million.

During twenty-five days of trial beginning in August 1983, the jury heard evidence regarding the sexual abuse of children and other details of the gruesome conditions at Artesia Hall that lead to its closing. In June 1973, following Joseph Farrar's indictment for the murder of an Artesia Hall student, the Texas attorney general had obtained a temporary restraining order in state district court to close the facility. The evidence at trial, and the jury's findings, reflected that Hobby had played a very minor role in the state's action.

The jury found, among other things, that all of the defendants *except* Hobby engaged in a conspiracy against

one or more of the plaintiffs; that this conspiracy was *not* the proximate cause of any damages to the Farrars; that Hobby "committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas"; but that the act or acts of Hobby were *not* a proximate cause of any damages to Joseph Farrar. (App. A-1 to A-4). Based upon these answers, the district court ordered "that Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs." (App. A-5 to A-6).

A panel of the Fifth Circuit affirmed the judgment in part, but held that the district court had erred in refusing to award Joseph Farrar nominal damages of one dollar, based upon the jury's one finding of some unspecified violation of his constitutional rights.[1] The case was remanded to the district court for further proceedings.[2] The Farrars then applied for attorneys' fees and expenses under 42 U.S.C. § 1988; and the court, after a hearing, granted the full amount of the Farrars' request, awarding a total of $317,662 in attorneys' fees and expenses, plus interest, against Hobby and nothing against the other defendants.

The Fifth Circuit reversed the award. Relying on this Court's decisions in *Texas State Teachers Association v. Garland Independent School District*,[3] *Rhodes v. Stewart*,[4] and

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[1] *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985).

[2] *Id.* at 1152-53.

[3] 489 U.S. 782 (1989).

[4] 488 U.S. 1 (1988).

Hewitt v. Helms,[5] the court concluded that the Farrars were not "prevailing parties" within the meaning of 42 U.S.C. § 1988:

> The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal victories are made." Of course, as the district court emphasized, the Farrars did succeed in securing a jury-finding that Hobby violated their civil rights[6] and a nominal award of one dollar. However, this finding did not in any meaningful sense "change the legal relationship" between the Farrars and Hobby. Nor was the result a success for the Farrars on a "significant issue that achieve[d] some of the benefit the [Farrars] sought in bringing suit." When the sole relief sought is money damages, we fail to see how a party "prevails" by winning one dollar out of the $17 million requested. Furthermore, even if the Farrars could be seen as victors, given their singular objective of money damages, surely theirs was "a technical victory . . . so insignificant, and . . . so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status."

Estate of Farrar v. Cain, 941 F.2d 1311, 1315 (5th Cir. 1991) (footnotes omitted).

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[5] 482 U.S. 755 (1987).

[6] In fact, only Joseph Farrar obtained a favorable jury finding; Dale Farrar got none. (App. at A-7).

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision is correct. Under the guidelines of this Court, the Farrars are not "prevailing parties" because their lawsuit failed to alter materially the legal relationship between them and Hobby. Nor was Joseph Farrar's recovery of one dollar as nominal damages, in a suit in which the plaintiffs' sole objective was monetary relief, a "significant" victory. The outcome of the action was a classic technical or *de minimis* "victory" for Joseph Farrar alone and, therefore, cannot support an award under 42 U.S.C. § 1988.

ARGUMENT

In *Garland*, this Court unanimously adopted the First Circuit's test for identifying whether a civil rights plaintiff is a prevailing party within the meaning of § 1988: "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind."[7] To satisfy this inquiry, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."[8] Whether a *material alteration* of that legal relationship has occurred is the

[7] 489 U.S. 782, 791-92 (1989) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

[8] *Id.* at 792 (citing *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987), and *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988)).

"touchstone" of the inquiry that must be made.[9] Accordingly, the inquiry here is whether Joseph Farrar's recovery of one dollar in nominal damages constitutes a "material alteration" of both plaintiffs' "legal relationship" with Hobby.

The Fifth Circuit correctly decided that the Farrars' recovery did not meet this test. By definition, theirs was the classic symbolic victory, one working only a "nominal" alteration in the legal relationship: the result of the lawsuit is that Hobby owes Joseph Farrar one dollar. To maintain that a "nominal" debt of one dollar constitutes a "material alteration" in the legal relationship between these litigants requires great imagination. If left to stand, the district court's award in this case would have accomplished a curious result: "nominal" becomes synonymous with "material."

Moreover, an award of attorneys' fees to the Farrars would violate the second aspect of this Court's holding in *Garland*:

> [A] technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status. . . . Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied.

489 U.S. at 792.

[9] *Id.* at 792-93.

That constitutional rights are indeed priceless in no way detracts from the truth that even these rights may sometimes be only technically infringed – infringed in degrees that justify only technical or symbolic redress. The Court's own example, given in *Garland*, is definitive of this case:

> For example, in the context of this litigation, the District Court found that the requirement that non-school hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague. The District Court characterized this issue as "of minor significance" and noted that there was "no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours." If this had been petitioners' only success in the litigation, we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988.

Id. (citations omitted).

Here is a finding that a regulation governing the conduct of the plaintiffs is unconstitutional and thus of no effect, so that they are free of its strictness. Can it be doubted that this is a "victory" of greater significance than the recovery of an amount of damages adequate to do little more than purchase a copy of the morning paper? Yet the Court offers it as a "clear" example of the sort of technical or symbolic victory that does not suffice for "prevailing party" status under § 1988.

To describe the outcome of this lawsuit as even a "technical victory" for the Farrars would be overly generous. At most, it is an insignificant, symbolic victory that

cannot support an award of attorneys' fees under § 1988. The Farrars obtained no injunctive, declaratory, or other relief that resulted in any material alteration of their long-past and fleeting legal relationship with Hobby. That is, the outcome of the lawsuit did not require Hobby to alter his behavior toward the Farrars.

The Farrars wanted just one thing: $17 million in damages. They got one dollar.[10] A better example than this case of a *de minimis* or "technical" victory can hardly be imagined, since an award of nominal damages is the classic reflection of a mere symbolic success. The First Circuit has observed: "Nominal damages are a mere token, signifying that the plaintiff's rights were *technically* invaded even though he suffered, or could prove, no loss or damage. . . ."[11] That is precisely the language that this Court used in *Garland* to describe *de minimis* victories within the meaning of § 1988 – victories that do not activate the First Circuit's formula for a fee award.

Petitioners suggest that the Fifth Circuit's holding conflicts with this Court's decision in *City of Riverside v. Rivera*.[12] They criticize the opinion below for failing to "discuss or cite" *Rivera*. Petitioners' assertion is incorrect and their criticism is misplaced.

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[10] In fact, the district court never signed a judgment against Hobby for the one dollar. Voting with their feet, petitioners and their lawyers concur in the view that their recovery is too insignificant to bother collecting.

[11] *Magnett v. Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973) (emphasis added).

[12] 477 U.S. 561 (1986).

Rivera presented the narrow issue "whether an award of attorney's fees under 42 U.S.C. § 1988 is *per se* 'unreasonable' within the meaning of the statute if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action."[13] *Rivera*, therefore, was concerned with the proper *amount* of a fee award, not the plaintiff's entitlement to any award at all. In a plurality opinion, this Court "reject[ed] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers."[14]

The issue resolved by the judgment in *Rivera* is distinct from the issue presented here. The Fifth Circuit concluded in this case that the Farrars failed to cross "the threshold to a fee award of some kind."[15] The Fifth Circuit did *not* base its holding on the amount of the fees awarded.[16] Rather, the Fifth Circuit reached only the question of the right to any fee *at all*:

> [W]e hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a

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[13] *Id.* at 564.

[14] *Id.* at 574 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

[15] 941 F.2d at 1313 (quoting *Garland*, 489 U.S. at 792).

[16] Although when compared to the result that the Farrars obtained, the district court's award of $317,662 in fees and expenses was hardly "reasonable." *See Garland*, 489 U.S. at 790 ("[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee. . . . ").

> damage suit and surely so since plaintiffs sought nothing more. We must – under *Garland*, *Hewitt*, and *Rhodes* – inquire into whether the plaintiff's victory, as measured by the relief actually obtained, was merely a *de minimis* or technical success.

941 F.2d at 1315-16 (footnotes omitted).

Thus, as this Court's holding required it to do, the Fifth Circuit evaluated the amount of the Farrars' "success" (one dollar) against the relief that they sought ($17 million). Although perhaps tempted to do so, the Fifth Circuit did not justify its holding on the basis that the fee award was disproportionate to the amount of damages recovered. *Rivera*, therefore, has no application here.

Petitioners emphasize the apparent conflict between the Fifth Circuit's holding and the decisions of six other circuits, as the Fifth Circuit opinion addressed in passing.[17] Petitioners include another Circuit in this list, the Fourth. Closer scrutiny, however, reveals that the only case plainly in conflict with the Fifth Circuit is the Second Circuit's decision in *Ruggiero v. Krzeminski*.[18] The critical distinction is that each of these cases, with the exception of *Ruggiero*, was decided before *Garland*.

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[17] 941 F.2d at 1316 ("Our holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.") (citing *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991); *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8th Cir. 1988); *Nephew v. City of Aurora*, 830 F.2d 1547, 1553 n.2 (10th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 976 (1988); and *Garner v. Wal-Mart Stores*, 807 F.2d 1536, 1539 (11th Cir. 1987).

[18] 928 F.2d 558 (2d Cir. 1991).

For example, before *Garland*, the Fourth Circuit had concluded: "The fact that plaintiff may prevail on the merits yet, under *Carey*, recover only nominal damages shall in no way diminish his eligibility for attorney's fees under § 1988. . . . "[19] After *Garland*, however, the Fourth Circuit thought better of this view, recognizing that a judgment for nominal damages only may be just the "rare case" that this Court envisioned when describing the type of technical or *de minimis* victory that will not support an attorneys' fee award.[20]

In *Garland*, this Court overruled the Fifth Circuit's "central issue" test for prevailing party status but in the same breath made plain that "prevailing party" status for § 1988 purposes requires success on at least *some* "significant issue . . . which achieves some of the benefit the parties sought in bringing the suit."[21] The "benefit" the Farrars sought did not include one dollar nominal damages; therefore, the Fifth Circuit's holding in this case is the only result that is consistent with *Garland*.

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[19] *Burt v. Abel*, 585 F.2d 613, 617-18 (4th Cir. 1978).

[20] *Spencer v. General Electric Co.*, 894 F.2d 651, 662 (4th Cir. 1990) (citing *Garland*, 489 U.S. at 792).

[21] 489 U.S. at 782 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1988)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 1992

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR, ET AL	§	CA NO.
VS.	§	75-H-987
CLARENCE D. CAIN, ET AL	§	

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that one or more of the defendants are entitled to either judicial or prosecutorial immunity as defined in the Court's charge?

Defendant Cain	Yes ___	No X
Defendant Hartel	Yes ___	No X
Defendant Gruver	Yes ___	No X
Defendant Urmy	Yes ___	No X

2. Do you find from a preponderance of the evidence that one or more of the defendants are entitled to qualified immunity as defined in the Court's charge?

Defendant Cain	Yes ___	No X
Defendant Hobby	Yes ___	No X
Defendant Hartel	Yes ___	No X
Defendant Gruver	Yes ___	No X
Defendant Urmy	Yes ___	No X

3. Do you find from a preponderance of the evidence that any of the defendants engaged in a conspiracy against one or more of the plaintiffs as defined in the charge?

Defendant Cain	Yes X	No ___
Defendant Hobby	Yes ___	No X
Defendant Hartel	Yes X	No ___
Defendant Gruver	Yes X	No ___
Defendant Urmy	Yes X	No ___

4. If you have answered Interrogatory No. 3 "Yes" as to any defendant, and only in that event, then answer:

Do you find from a preponderance of the evidence that such conspiracy was a proximate cause of any damages to the plaintiffs?

Yes ___ No X

5. If you have answered Interrogatory No. 4 "Yes" and only in that event, then state the amount of damages, if any, found by you from a preponderance of the evidence as to each plaintiff proximately caused by such conspiracy, if any.

J.D. Farrar	$N/A
Dale Lawson Farrar	$N/A

6. If you answered "yes" to any Defendant in Interrogatory No. 4 and you find from a preponderance of the evidence that the act or acts were committed intentionally, maliciously, recklessly or in callous disregard of the civil rights of one or both of the Plaintiffs then state the amount of damages, if any, you find will punish the

Defendant or Defendants and serve as a deterrent to prevent others from engaging in similar acts.

J.D. Farrar	$N/A
Dale Lawson Farrar	$N/A

If you have answered Interrogatory No. 3 "no" as to the Defendant Hobby then answer interrogatory No. 7.

7. Do you find from a preponderance of the evidence, that Defendant Hobby committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas?

Yes X

No ___

8. If you answered Interrogatory No. 7 "Yes" and only in that event, then answer:

Do you find from a preponderance of the evidence that such act or acts were a proximate cause of any damages to Plaintiff Joseph Davis Farrar?

Yes ___

No X

9. If you answered Interrogatory No. 8 "Yes" and only in that event, then state the amount of damages, if any, found by you from a preponderance of the evidence that caused Joseph David Farrar damages as a result of Defendant Hobby's act or acts.

$N/A

10. If you answered "Yes" to Interrogatory No. 8 and you find from a preponderance of the evidence that the

act or acts were committed intentionally, maliciously, recklessly or in callous disregard of the civil rights of Plaintiff Joseph Davis Farrar then state the amount of damages, if any, you find will punish Defendant Hobby and serve as a deterrent to prevent others from engaging in similar act or acts.

$N/A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR AND DALE LAWSON FARRAR	§	
VS.	§	CIVIL ACTION NO.
CLARENCE C. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER and ARTHUR J. HARTELL, III	§	75-H-987

JUDGMENT

This matter having come on for trial, and the jury having duly rendered its verdict and having found as follows:

a) that none of the Defendants Cain, Hartel, Gruver or Urmy were entitled to judicial or prosecutorial immunity;

b) that none of the defendants Cain, Hobby, Hartel, Gruver or Urmy were entitled to qualified immunity;

c) that the Defendants Cain, Hartel, Gruver and Urmy engaged in a conspiracy against one or more of the Plaintiffs to deprive them of their civil rights;

d) that said conspiracy was not the proximate cause of any damage to Plaintiffs;

e) that Defendant Hobby committed an act or acts under color of state law that deprived

Plaintiff Joseph D. Farrar of a civil right guaranteed by the Constitution and laws of the United States and State of Texas; and

f) that such act(s) committed by Defendant Hobby was or were not the proximate cause of any damage to Plaintiff Joseph D. Farrar.

It is ORDERED, ADJUDGED and DECREED, that that [sic] Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs.

Signed this 10th day of November, 1983.

ROBERT O'CONOR, JR.
United States District Judge

(4)

No. 91-990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 16, 1991
CERTIORARI GRANTED FEBRUARY 24, 1992

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR, ET AL.	§	CA NO. 75-H-987
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RELEVANT DOCKET ENTRIES

6-13-75	1	Complaint filed. (6) summons issued.
6-20-75	2	Pltfs' FIRST AMENDED COMPLAINT adding Dale Lawson Farrar as Pltf. filed.
8-24-76	47	PLTF'S Second Amended Complaint filed.
9-13-76	48	Defts' Clarence D. Cain, Ruth Urmy, William P. Hobby, Jr., and Raymond W. Vowell's Amended Answer, filed.
5-19-78	76	Deft. William P. Hobby, Jr.'s MOTION for Summary Judgment, filed. M/D 7-12-78
7-3-78	83	Pltfs' RESPONSE to Defts' Various Motions for S/J, filed.
7-12-78	84	Defts' REPLY to Pltfs' Response to Defts' various Motions for Summary Judgment, filed.
1-24-79	96	(RO) ORDER, filed. Parties ntfd, mc.

1. Defts Cain, Hobby, Vowell, Gruver & Urmy Motions for Summary Judgment-GRANTED

2. Defts Cain, Hobby, Vowell, Gruver & Urmy DISMISSED w/prejudice.

3. Costs taxed against pltf.

2-20-79 97 NOTICE of APPEAL by Pltfs. to Order entered 1-24-79, filed.

3-22-79 99 FINAL JUDGMENT entered NUNC PRO TUNC effective 1-24-79, filed. (copy to parties) mac.

5-4-79 100 Pltfs.' MOTION for Relief from an Order and Judgment, filed.

5-16-79 (100) (RO) ORDER DENYING Motion of Pltfs. for Relief from an Order and Judgment, filed. P/n. mac

3-19-81 101 Certified copy of JUDGMENT by Court of Appeals Feb 23, 1981 and issued as MANDATE Mar 17, 1981, VACATED and REMANDED to District Court and further ORDERED that each party bear own costs on appeal, filed. tf

3-19-81 102 Certified copy of OPINION by Court of Appeals, filed. tf

9-21-81 111 Pltfs' BRIEF in Support of Opposition to Deft's Motion for Summary Judgment, filed. jh

12-8-81 112 (RO) MEMORANDUM & ORDER, filed. Parties ntfd.aa Defts motions for summary judgment is DENIED.

4-12-82 121 (RO) ORDER, filed. Parties ntfd jh That defts' Motion f/Leave to Amend their answer is GRANTED. DD 4-13-82

4-30-82 122 Defts' Cain, Urmy, Hobby, Jr., Vowell & Gruver MOTION f/Leave to filed Amended Answer, filed. jh (unopposed) (w/amended answer) DD 5-5-82

8-16-82 130 Defts' SUGGESTION OF Death, filed. jh

8-2-83 157 (RO) PRETRIAL CONFERENCE, filed. jh
Appearances: Waggoner Carr & Ken Mackey f/pltfs. Rick Gary f/defts. Lt. Gov. Hobby; Deft A. J Hartel appear w/counsel J.C. Zbranek; James P. Allison f/defts Cain, Urmy & Gruner; Deft Judge Clarence Cain appear w/counsel Gilbert Low.
Co-Administrators Motion to Sub Co. Admin. as parties pltf. GRANTED.
Deft Raymond W. Vowell's Motion to Dismiss GRANTED. Jury Trial to begin Monday Aug. 15, 1983/10:00 am.

8-15-83 165 (RO) 1ST DAY JURY SELECTION & JURY TRIAL, filed. jh (Rptr: K.Howell)
Appearances: Waggoner Carr & Ken Mackey f/pltf; James Allison & Lewis Boyd f/defts Cain Urmy & Gruver;

Richard E. Gary, III f/deft Hobby; J.C. Zbranek f/deft Hartel.
Jury selection & sworn. 1) Nancy Jane Fullilove 2) Yvonne M. Barkate 3) Charles Gelske, Jr. 4) James C. Ruth 5) Richard L. McMahon 6) Bedford Gottlieb 1st alternate) Hellen M. Ray 2nd alternate) Edward E. Kelley 3rd alternate William M. King. Jury removed. Pltf calls witnesses regarding documents in their possession.
1) Bruce Stratten 2) Harvey Loving 3) Fred Clements-No Document-Witnesses released from subpoena & discharged as witnesses. 4) C.L. Buckole 5) Carol Clements-Documents tendered witnesses released subject to recall. Opening statements. Rule invoked. Pltf evidence begins 1) Deposition of Joseph Davis Farrar.

8-16-83 166 (RO) JURY TRIAL 2ND DAY, filed. jh Rptr: Kay Howell)
Appearances: Same as 1st day.
Pltf's evidence continues: 1) Deposition of Joseph Farra continues.

8-17-83 167 (RO) JURY TRIAL 3RD DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Pltf's Evidence continues. 1) Deposition of Joseph Farrar continues. 2) Dale Farrar.

8-22-83 168 (RO) JURY TRIAL 4TH DAY, filed. jh (Rptr: Kay Howell)

Appearances: Same as 1st day.
Pltf evidence continues. 2) Dale Farrar (testimony continues)

8-23-83 169 (RO) JURY TRIAL 5TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Pltf's evidence continues. 2) Testimony of Dale Farra continues

8-24-83 170 (RO) JURY TRIAL 6TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Pltf's evidence continues. 2) Dale Farra (testimony continues)

8-25-83 171 (RO) JURY TRIAL 7TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Pltf's evidence continues. 2) Dale Farrar (testimony continues)

8-26-83 172 (RO) JURY TRIAL 8TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st Day.
Pltf's evidence continues. 2) Dale Farrar (testimony continues)

8-29-83 173 (RO) JURY TRIAL 9TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day
Pltf's evidence continues. 3) Kay Bowen Collins, 4) Sebastian Mier

8-30-83	174	(RO) JURY TRIAL 10TH DAY, filed. jh (Rptr: Kay Howell) Appearances: Same as 1st day. Pltf's evidence continued. 5) Jack Hartel. 6) Clarence Cain. Pltf's evidence continued. 5) Jack Hartel. 6) Clarence Cain
8-31-83	175	(RO) JURY TRIAL 11TH DAY, filed. jh(Rptr: Kay Howell) Appearances: Same as 1st Day. Pltf evidence continues. 7) Deposition of W.A Cowan, Jr. 8) Deposition of Raymond W. Vowell, 9) Lt. Govt. William P. Hobby.
9-1-83	176	(RO) MINUTES OF JURY TRIAL, filed.aa (Rptr Kay Howell) Appearances: Waggoner Carr and Ken E. Mackey f/pltf; James E. Gray, III f/deft Hobby. J.C. Zbranek for deft Hartel. Pltf's evidence continues. 10) depositions of John H. Lindel.
9-2-83	179	(RO) JURY TRIAL 13TH DAY, filed. jh (Rptr: Kay Howell) Appearances: Same as 1st day Pltf's evidence continues. 11) Edna Accardo, 12) Nell Harrison 13) Joyce Webster.
9-6-83	182	(RO) JURY TRIAL 14TH DAY, filed. jh (Rptr: Kay Howell) Appearances: Same as 1st day Pltf's evidence continues. 14) Ruth Urmy.

9-7-83	183	(RO) JURY TRIAL 15TH DAY, filed. jh (Rptr: Kay Howell) Appearances: Same as 1st day. Pltf's evidence continues. 14) Ruth Urmy (testimony continues) 15) Wayne Ball.
9-7-83	184	Pltfs' MOTION f/Leave to file pltfs' Third Amended Complaint, filed. jh (w/3rd amended complaint)
9-8-83	185	(RO) JURY TRIAL 16TH DAY, filed. (Rptr: Kay Howell) Appearances: Same as 1st day. Pltf's evidence continues. 15) Wayne Ball, 16) Lonnie Gruver
9-9-83	186	(RO) JURY TRIAL 17TH DAY, filed. jh (Rptr: Kay Howell) Appearances: Same as 1st day. Pltf's evidence continued. 16) Lonnie Gruver (Testimony Continues) 7) Dr. Tom McKinley. Pltf rests. Defts move f/directed verdict. DENIED.
9-12-83	189	(RO) JURY TRIAL 18TH DAY, filed. jh(Rptr: Kay Howell) Appearances: Same as 1st day. Deft's evidence begins. 1) Kay Diane Allen, 2) Dr. len Dan Kerr, Jr., 3) Dr. Charles Houser. Alternate Juror, Edward Kelly, excused due to death in his family. 4) Clay Autry.
9-13-83	190	(RO) JURY TRIAL 19TH DAY, filed. jh (Rptr: Kay Howell) Appearances: Same as 1st day.

Deft's evidence continues. 5) Sonny Huey, 6) Debbie Gale Crum 7) Joy Whitman, 8) Martha Turner.

9-14-83 191 (RO) JURY TRIAL 20TH DAY, filed. jh(Rptr: Kay Howell)
Appearances: Same as 1st day.
Defts' evidence continues. 8) Martha Turner (testimony continues 9) Carol Ann Spanadeo 10) Ruby Kilpatrick 11) Linda Menchen.

9-15-83 192 (RO) JURY TRIAL 21ST DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Defts' evidence continues. 12) Virginia Hvoball

9-16-83 193 (RO) JURY TRIAL 22ND DAY, filed. (Rptr: Kay Howell)
Appearances: Same as 1st day.
Deft's evidence continues. 13) Wm. Keith Jaye, Jr.. 14) Shar Jaye Williams.

9-20-83 196 (RO) JURY TRIAL 23RD DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Deft's evidence continues. 15) John Hill, 16) W.G. Woods, Jr. 17) Deposition of Charlotte Fisher Harvey, 18)James B. Sterling 19) Deposition of Margaret Carol Gronberg Brown 20)Deposition of Robert Craven

9-21-83 198 (RO) JURY TRIAL 24TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st Day

Defts. evidence continues. 21) Dolph Briscoe.
Pltf cross of witness, out of order, 19)Deposition of Margaret Brown. 22)Deposition of Joseph Farrar, 23)Deposition of Michael Wayne Langford. 24) George Campbell.

9-22-83 202 (RO) JURY TRIAL 25TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Defts. rests. Pltf rebuttal begins. 1) Dr. Steve Hotze, 2)Lee McIlvain, 3) Wilma Lea McIlvain, 4)Inez Hardy, 5)Julius Knigge 6) Dr. Lovell B. Crain(by deposition). Pltf closes.
Deft closes. Recess to 9-23-83/1:30p.m.
Defts' move f/Directed Verdict. DENIED.

9-23-83 204 (RO) JURY TRIAL 26TH DAY, filed. jh (Rptr: Kay Howell)
Appearances: Same as 1st day.
Closing Arguments. Jury Charged. Jury moved. Pltf objects to charge DENIED. Deft objects to charge DENIED. Pltf moves to not allow jury to take written charge to deliberations. DENIED. Jury returned & given final instructions. Alternate jurors excused. Deliberations begin. Jury request to begin deliberation 9-24-83, 8:30 am.

9-24-83 205 (RO) JURY TRIAL, filed. jh (Rptr: Kay Howell)

		Appearances: Same as 1st day Jury Deliberations begin
9-24-83	207	Pltfs' THIRD AMENDED COMPLAINT, filed. jh
9-25-83	209	(RO) JURY TRIAL, filed. jh (Rptr: Kay Howell) Appearances: Same as 1st day. Jury Deliberations resume. Jury returns w/verdict in favor of deft.
9-25-83	210	SPECIAL INTERROGS' to the Jury, filed. jh
10-7-83	218	Pltfs' MOTION FOR JUDGMENT, filed. jh M/D 10-24-83 by clerk
11-10-83	222	(RO) JUDGMENT, filed. Parties ntfd.aa Dkt'd 11-15-83 Pltf's take nothing and action dismissed on the merits and parties bear their own costs.
12-2-83	223	Pltf's MOTION For NEW TRIAL, filed. M/D 1/16/83 Dkt'd 12-28-83
1-18-84	226	(RO) ORDER, filed. Par Dkt'd 1-19-84 Pltfs' Motion for a New Trial is DENIED.
2-14-84	227	Pltf NOTICE OF APPEAL from final judgment entered Nov 10, 1983 and Order denying Motion for New Trial entered Jan 18 1983, filed. (Fees not paid). bvb

1-13-85	239	Certified copy of JUDGMENT by Court of Appeals on Apr 8, 1985, and issued as MANDATE May 24, 1985, AFFIRMING IN PART, REVERSING IN PART and REMANDED to District Court and FURTHER ORDERED that each party bears its own costs on appeal, filed. mac
7-19-85	241	Pltf's MOTION FOR HEARING on application for allowance of compensation and reimbursement of expenses, filed. dm M/D Aug 5, 1985 by clerk.dkt'd 7-10-85
8-8-85	242	AJ Hartel, III's REPLY to pltfs' Motion for rehearing on application for allowance of compensation and reimbursement of expenses, filed. dm dkt'd 8-8-85
8-19-85	243	Defts' RESPONSE IN OPPOSITION to pltfs' Motion for Hearing on application for allowance of compensation and reimbursement of expenses, filed. dm dkt'd 8-19-85
12-10-85	244	Pltf's BRIEF in support of Pltfs final application for attys fees, filed. db
12-10-85	245	FINAL APPLICATION for Allowance of Compensation and Reimbursement of Expenses, filed. db dkt'd 12-11-85
12-19-85	246	Deft's RESPONSE IN OPPOSITION to pltfs' Final application for allowance of

compensation and reimbursement of expenses, filed. db dkt'd 12-19-85

1-21-86 247 SUPPLEMENTAL BRIEF, of deft Cain in opposition to pltfs' application for atty's fees, filed. db

1-31-86 248 MOTION OF Deft A.J. Hartel, III to introduce evidence prior to determination of atts' fees entitlement, filed. db
M/D Feb 24, 1986 by clerk.

1-31-86 249 SUPPLEMENTAL BRIEF of deft A.J. Hartel, III, filed. db
dkt'd 1-31-86

1-14-86 (LNH) PRETRIAL CONFERENCE:
Mackey & Carr f/pltfs; Keller, Zbranck, Low f/defts
1. Court to determine issue of entitlement to atty's fees
2. Fees $336,095
3. Motion f/atty's fees-under advisement. dkt'd 4-21-86

7-21-86 250 SUPPLEMENTAL BRIEF in support of Pltfs' Final Application f/Attys fees, filed. db dkt'd 7-21-86

9-2-86 251 Deft's MEMORANDUM OF POINTS & AUTHORITIES in Response to pltfs Supplemental Brief & final application f/attys fees, filed. db dkt'd 9-2-86

9-12-86 252 (LNH) ORDER, filed. parties ntfd. jgm
Dktd 9-15-86
Defts are ordered to provide the court by Oct. 27, 1986, with an accounting

summary of the atty-hrs expended by year, allocated to the extent possible to individual defts and particular stages (First appeal, pre-trial, trial, and second appeal). Rates may be supplied at the defts' option.

9-22-86 253 Defts atty Gilbert Low's ACCOUNTING SUMMARY OF HOURS EXPENDED, filed. jgm

10-7-86 254 Defts' SUPPLEMENTAL MEMORANDUM IN RESPONSE to pltfs' supplemental brief and final application for attys fees, filed. jgm

10-23-86 255 Defts' RESPONSE to the Court's Order requesting an accounting summary of atty hours expended 1. filed. jgm

11-4-86 256 Deft's MOTION requesting a Hearing on the issue of atty's fees, filed. db (Unopposed) dkt'd 11-5-86

11-12-86 257 RESPONSE of A.J. Hartel, III, filed. jgm

1-20-87 258 TECHNICAL AMENDMENTS TO FINAL APPLICATION FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES, filed. jgm Dktd 1-26-87

1-23-87 259 (LNH) HEARING ON ATTYS FEES, filed. jgm RPTR-Maruffi
Appearances: Carr & Mackey f/pltf; Keller, Mattax & Zbranek f/defts. Pltf

application for attys fees granted
Dktd 2-3-87

1-30-87 260 (LNH) ORDER ON ATTYS FEES, filed. parties ntfd, jgm
Pat Smith, Dale Farrar, and Dale Lawson are awarded attys' fees of $280,000.00, expenses of $27,932.00, and $9,730.00 of prejudgment interest on the expenses (at 9% after Sept. 1983) as additional costs of court against William P. Hobby, Jr., plus interest at 5.75% per annum from Jan. 23, 1987; Pat Smith, Dale Farrar and Dale Lawson Farrar recover nothing of Clarence Cain, and Arthur Hartell, III.
Dktd 2-3-87

2-9-87 261 EXCERPT OF PROCEEDINGS (Closing arguments) before Judge O'Conor on Aug. 15, 1983 to Sept. 25, 1983, filed. jgm

2-9-87 262 Deft Hobby's MOTION FOR NEW TRIAL AND REHEARING, filed. jgm
M/D Feb. 23,1987 by clerk dktd 2-10-87

2-9-87 263 Deft Hobby's REQUEST FOR HEARING AND OPPORTUNITY TO SUPPLEMENT THE RECORD, filed. jgm
Dktd 2-10-87

2-10-87 264 Pltf's MOTION TO REFORM ORDER ON ATTY'S FEES, Filed. jgm
M/D Feb. 23,1987 by clerk

2-13-87 265 TRANSCRIPT OF PROCEEDINGS (judges Decision) before Judge Lynn Hughes on Jan. 23,1987, filed. jgm

2-20-87 267 NOTICE, filed. jgm (LNH) parties ntfd
On William Hobby's motion, a hearing will be held on Mar. 17, 1987 at 10:00 am. The briefing schedule is:
Feb. 20, 1987 Defts' memorandum
Mar. 6,1987 Pltfs' response
Mar. 13,1987 Defts' reply
Please send copies of all brief to Judge Hughes' chambers.

2-20-87 268 MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF Deft Hobby's Motion for new trial, filed. jgm
Dktd 2-23-87

3-6-87 269 Pltf's MEMORANDUM IN RESPONSE TO DEFT HOBBY'S MOTION FOR NEW TRIAL AND REHEARING, filed.
Dktd 3-10-87, cd.

3-13-87 270 Deft Hobby's RESPONSE TO MEMORANDUM IN RESPONSE TO DEFT HOBBY'S MOTION FOR NEW TRIAL AND HOBBY'S MOTION FOR REHEARING, filed.
Dktd 3-17-87, cd.

3-17-87 271 (LNH) MOTION HEARING minutes, filed. (Rptr-H. Chester)
Appearances: Carr & Mackey f/pltf; Cowan, Keller, Cherry & Zbranek f/deft.
Counsel to brief preclusion issue by

		March 30th. Deft Motion on issue of attys fees-taken under consideration pending briefing schedule. Dktd 3-24-87, cd.
3-17-87	272	EXHIBIT LIST of movant Hobby, filed. Dktd 3-24-87, cd.
3-20-87	273	TRANSCRIPT of Hearing before Judge Hughes on 3-17-87, filed. Dktd 3-24-87, cd.
3-30-87	274	Pltfs' MEMORANDUM REGARDING THE DOCTRINES OF LAW OF THE CASE AND CLAIM PRECLUSION, filed. cd
3-30-87	275	Deft Hobby's SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HOBBY'S MOTION FOR REHEARING, filed. cd
4-3-89	303	(LNH) ORDER, entered. bj parties ntfd The parties are invited by May 1, 1989, to supplement their brief in light of the United States Supreme Court's ruling in Texas Teachers Assoc. v. Garland School Dist., No. 87-1759 (Mar. 28, 1989).
5-1-89	304	Pltfs' Supplemental Brief to Their Memorandum in Response to Deft Hobby's Motion for New Trial and Rehearing, filed. bj eod 5-2-89
5-1-89	305	Deft Hobby's Supplemental Memorandum of Points and Authorities

		in Opposition to Pltfs' Application for Atty's fees, filed. bj eod 5-2-89
7-17-89	306	PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANT HOBBY'S SUPPLEMENTAL MEMORANDUM, filed. eod 7-19-89
7-17-89	307	DEFENDANT HOBBY'S RESPONSE TO PLAINTIFFS' REPLY MEMORANDUM, filed. eod 7-19-89 cj
8-31-90	308	(LNH) ORDER DENYING RECONSIDERATION OF ATTY'S FEES., entered Parties ntfd. eod 8-31-90 hs
8-31-90	309	(LNH) MEMORANDUM ON ATTY'S FEES, entered Parties ntfd. Supplemental findings to those in the record. The mtn to reconsider will be denied.eod 8-31-90 hs See Order for more detail.
9-21-90	310	Deft William P. Hobby, Jr.'s NOTICE OF APPEAL from the court's order denying reconsideration of attorney's fees., filed. eod 9/25/90 jd

(Filed July 12, 1983)

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR,	§	
and DALE LAWSON	§	
FARRAR	§	
	§	CA. NO. 75-H-987
VS.	§	
	§	
CLARENCE D. CAIN,	§	
RUTH URMY,	§	
WILLIAM P. HOBBY,	§	
JR., RAYMOND W.	§	
VOWELL, LONNIE A.	§	
GRUVER, and	§	
ARTHUR J. HARTEL,	§	
III	§	

MOTION TO SUBSTITUTE
CO-ADMINISTRATORS AS PARTIES PLAINTIFF

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Now comes Pat Smith and Dale Farrar, Co-Administrators of the Estate of Dr. Joseph D. Farrar, through their attorney Ken E. Mackey, and move this Court for an Order substituting them as Plaintiffs and providing for the continuance of this action; and in support of this Motion would show unto the Court as follows:

1. On February 20, 1983, Plaintiff Dr. Joseph D. Farrar died leaving a Last Will and Testament. The Will was duly admitted to probate in the Probate Court of Harris County. Said Will appointed Charles Erhardt, III as Executor, and, due to Mr. Erhardt's inability to act, a petition was filed in that Court to appoint Pat Smith and Dale Farrar, Petitioners herein, the Co-Administrators of that Estate. On May 10, 1983, Dale Farrar and Pat Smith were duly appointed the Co-Administrators of the Estate of Dr. Joseph D. Farrar, who thereupon commenced acting and are still acting in their capacities as Co-Administrators.

2. Prior to the death of Dr. Joseph D. Farrar, Plaintiff Dr. Joseph D. Farrar filed the above styled action against the above named Defendants. This lawsuit is an action for money damages arising from deprivation of Dr. Joseph D. Farrar's civil rights as guaranteed by the United States Constitution as well as for personal and property damage due to the Defendants wrongful tortious conduct. It is based upon the United States Constitution, the Civil Rights Acts of 1870 and 1871, 42 USC 1983, 28 USC 1343, as well as the Constitution and the laws of the State of Texas. Said cause or caused of action pursuant to Article 5545 T.R.C.S. and the laws of the State of Texas are not extinguished by Plaintiff's death but survive to and in favor of the heirs and legal representatives of the estate of the deceased Plaintiff.

3. Simultaneously with the filing of this Motion, Pat Smith and Dale Farrar, the Co-Administrators of the Estate of Dr. Joseph D. Farrar, suggested on the record the death of Dr. Joseph D. Farrar pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure.

4. This Motion is made and based upon the matters stated herein, the notice of Motion heretofore filed and served on all parties, as provided in Rule 4 and 25(a)(1) of the Federal Rules of Civil Procedure and on all the pleadings, papers, records and files in this action. Also incorporated by reference are: a) the affidavit of Dale Farrar marked as Exhibit "A", and; b) the Order Admitting Will to Probate and Authorizing Letters of Administration with Will Annexed marked as Exhibit "B".

5. Pursuant to Local Rule 15 counsel for Movants consulted by telephone with James P. Allison, attorney for Defendants Cain, Urmy and Gruver in this matter. Mr. Allison indicated that he may have an objection to this motion. In addition, counsel for movant attempted to reach Richard Gray and J. C. Zbranek, other opposing counsel in this matter, by telephone, but was unable to reach same.

WHEREFORE, Movants Pat Smith and Dale Farrar the Co-Administrators of the Estate of Dr. Joseph D. Farrar pray that this Court enter an Order substituting them as parties Plaintiff in the place and stead of Dr. Joseph D. Farrar.

Respectfully submitted,
HARRISON & JORDAN
814 Leopard
Corpus Christi, Texas
78401
(512) 883-8833

By: Ken E. Mackey

(Filed

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR AND DALE LAWSON FARRAR, PLAINTIFFS	§	
vs.	§	CIVIL ACTION NO. 75-G-987
CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., LONNIE A. GRUVER, AND ARTHUR J. HARTELL, III DEFENDANTS	§	

PLAINTIFFS' THIRD AMENDED COMPLAINT

I.

This is a civil action for money damages arising from deprivations, under color of law of the States of Texas, of rights, privileges, and immunities secured by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, the Civil Rights Acts of 1870 and 1871, 42 USC 1983, 28 USC 1343, the Constitution and laws of the State of Texas.

II.

The Court [has] jurisdiction of the action by virtue of 28 USC 1343, 28 USC 1392, 28 USC 1393, an d 42 USC 1983.

III.

Plaintiff JOSEPH DAVIS FARRAR is a resident of Houston, Harris County, Texas. At all times material herein, he was a Director and Vice President of Dolen

Educational Foundation, operating a child care facility known as ARTESIA HALL in Liberty County, Texas.

Plaintiff DALE LAWSON FARRAR is a resident of Houston, Harris County, Texas. At all times material herein, he was an employee and official of Artesia Hall.

Defendant CLARENCE D. CAIN is a resident of Liberty, Liberty County, Texas, and is and was at the time of the acts complained of herein, District Judge of the 75th Judicial District of the State of Texas and may be served in the Liberty County Courthouse, Liberty, Texas.

Defendant WILLIAM P. HOBBY, JR., is a resident of Houston, Harris County, Texas, and is and was at the time of the acts committed in 1973 and complained of herein, Lieutenant Governor of the State of Texas and may be served either at his office and apartment in the State Capitol in Austin, Texas, in his Houston office at The Houston Post, 4747 Southwest Freeway, Houston, Texas, or at his residence at 1507 South Boulevard, Houston, Texas.

Defendant RUTH URMY is a resident of Houston, Harris County, Texas, and is and was at the time of the acts complained of herein, an employee of the State Department of Public Welfare of Texas in Houston and may be served at her residence at 1116 Stanford or at her office, 3137 Old Spanish Trial, both in Houston, Texas.

Defendant LONNIE ARNOLD GRUVER is a resident of Dayton, Liberty County, Texas, and was at the time of the acts complained of herein, an employee of the State Department of Public Welfare of Texas in the Houston area and may be served with citation at 751 North Cleveland Street, Dayton, Texas.

Defendant ARTHUR J. HARTELL, III,, is a resident of Liberty, Liberty County, Texas, and is and was at the time of the acts complained of herein, County Attorney of Liberty County, Texas, and may be served either at his office in the Liberty County Courthouse, Liberty, Texas, or Room 292, 1923 Sam Houston Street, Liberty, Texas.

Plaintiffs herein are suing these Defendants, while they were acting under color of law, in their individual and not in their official capacities such as State District Judge, Lieutenant Governor of Texas and County Attorney of Liberty County (and the later not as a prosecutor), for money damages only. No injunctive relief is now herein sought, nor would such now serve any useful purpose.

IV.

The deprivations mentioned in Paragraph I above include, among others, deprivations of liberty and property without due process by means of malicious prosecution, false imprisonment, improper executive influence and interference in administrative decisions, improper judicial influence and interferences in administrative and executive decisions, and improper administrative decisions and acts, all under color of law, by said Defendants, acting individually and with each other and other persons hereinafter reflected and with persons unknown.

The objects of these deprivations were as follows:

A. To destroy the livelihood, reputation, and professional life of Plaintiff Joseph Davis Farrier;

B. To close Artesia Hall by any means possible including, but not limited to, destroying the reputation and professional life of both Plaintiff Joseph Davis Farrier and Plaintiff Dale Lawson Farrier.

C. To directly or indirectly prevent the enrollment of students from Artesia Hall, including Black Americans, in the Tarkington Independent School District;

D. To directly or indirectly remove from Liberty County, Texas, all students, black and white, present at Artesia Hall; and

E. To directly or indirectly eliminate and embarrass a strong potential Political candidate for his office in the State of Texas, Price Daniel, Jr.

V.

Beginning on or about July 1, 1971, and continuing up to or at least June 28, 1973, these Defendants, individually and severally, jointly and in concert, set about to do the following:

A. To deny a license to Aston Educational Foundation, Inc., or its successor, Dolen Educational Foundation, from the Texas Department of Public Welfare for Artesia Hall to operate as a child care facility;

B. To revoke such license when granted by the Texas Department of Public Welfare;

C. To indict Plaintiff Joseph Davis Farrar; and

D. To close Artesia Hall by whatever means available including indictment of Plaintiff Dale Lawson Farrar.

This course of conduct is reflected through the following acts and circumstances:

(1) On July 1, 1971, Ruth Urmy and Liberty County Attorney Arthur J. Hartel, III, met and discussed whether or not a Department of Public Welfare license application should be accepted from J.

D. Farrar and Artesia Hall. The County Attorney then recommended that the license application be accepted but that compliance with Department of Public Welfare standards should then be made impossible.

(2) On or about July 22, 1971, Ruth Urmy opposed a continuance of an injunctive hearing against Artesia Hall. Said continuance was agreed upon by representatives of the Department of Public Welfare and Dr. Farrar for the purpose of completing a licensing study on Artesia Hall.

(3) On or about July 24, 1971, Ruth Urmy had a telephone conversation with the County Attorney, Arthur J. Hartell, Ill, warning him of the potential agreed continuance. As of that date Ruth Urmy had been removed from any official responsibility for any of the Department of Public Welfare affairs concerning Artesia Hall.

(4) On or about July 27, 1971, Ruth Urmy wrote the legal department of the Department of public Welfare questioning the "purposes" clause of the original corporate owner of Artesia Hall, Aston Educational Foundation, even though she no longer was assigned any responsibility concerning Artesia Hall.

(5) On or about July 26, 1971, Judge Clarence D. Cain instructed Lonnie Arnold Gruver, a Liberty County Department of Public Welfare worker, to prepare a licensing study for Judge Cain personally. This instruction was given even though the Judge had no authority or jurisdiction over any facet of the licensing process and even though Lonnie Arnold Gruver was not then an officer of the Court in any respect. Although Lonnie Arnold Gruver was an employee of the Executive Branch of government and not the Judicial Branch, he likewise had not

Department of Public Welfare assigned responsibility for [any] licensing study of Artesia Hall.

(6) On November 22, 1971, Judge Cain insisted that the injunctive hearing go forward even though the issue was clearly moot because a Department of Public Welfare license to operate had been granted to Artesia Hall on November 19, 1971, a fact known to Judge Cain at the time. J. D. Farrar was represented at the hearing on November 22, 1971, by Price Daniels, Jr. as local counsel, and W. Kendall Baker, a Houston attorney.

(7) Soon after November 22, 1971, Judge Cain appointed Lonnie Arnold Gruver as a Liberty County Probation Officer.

(8) On or about February, 1972, Judge Cain communicated with Mr. Will G. Bond, then a member of the State Board of Public Welfare, and requested an investigation into the property of the licensing of Artesia Hall and the quality of the care given the children at Artesia Hall. There was at this time no cause or controversy pending before Judge Cain concerning Artesia Hall.

(9) On or about March 2, 1972, Judge Cain told Department of Public Welfare Investigator Jon Lindell that the only thing to be done with Artesia hall was to "wipe it out." There was at this time no case or controversy pending before Judge Cain concerning Artesia Hall.

(10) On or about December 7, 1972, the Foreman of the Liberty County October Term 1972 Grand Jury requested a Texas Department of Public Safety investigation of Artesia Hall. The Grand Jury had been empaneled by Judge Cain.

(11) On or about January, 1973, the Grand Jury of Liberty County received an investigative report from the Texas Department of Public Safety which disclosed no significant violation of law and failed to make any remarks concerning the death of an Artesia Hall student on November 14, 1972, Danna Hvoboll.

(12) On or about April, 1973, for reasons undisclosed by public record, the October Term Grand Jury was held over by Judge Cain.

(13) On or about May 13, 1973, the then held over Grand Jury requested approval of the Commissioner's Court of Liberty County, Texas, to retain C. Bruce Stratton, an attorney, as Special Prosecutor to assist in investigation of Artesia Hall.

(14) On or after May 13, 1973, C. Bruce Stratton, without authority [of] the Commissioner's Court, retained the services of a private investigating firm to assist in investigating Artesia Hall.

(15) On or about April 30, 1973, a meeting of the School Board of the Tarkington Independent School District was held wherein Dr. J. D. Farrar and his counsel presented the request of Artesia Hall to enroll students, including Black Americans, at schools operated by Tarkington Independent School District.

(16) On or about June 13, 1973, counsel for J. D. Farrar hand delivered a letter to all members of the School Board, including one W. E. Ferguson, strongly stating Dr. Farrar's request for teaching assistance at Artesia Hall. Said letter intimated legal action should the School Board deny assistance to Artesia Hall.

(17) On June 14, 1973, the holdover Grand Jury returned an indictment of J. D. Farrar, in Cause No. 11,371, for murder with malice of Danna Hvoboll. This indictment had no factual basis and stated no

offense under the laws of the State of Texas and was returned by a Grand Jury that contained the same W. E. Ferguson referred to in Paragraph V (16) above.

(18) On June 14, 1973, Judge Cain accepted return of this indictment well knowing his own history of personal animosity against J. D. Farrar as manifested to John Lindell, referred to in Paragraph V (9) above. Further, Judge Cain knew the indictment had no basis in law or fact.

(19) On June 15, 1973, J. D. Farrar was arrested and held without bond on the indictment previously returned.

(20) In June, 1973, Price Daniel, Jr., former counsel for J. D. Farrar in the original licensing suit and then Speaker of the House of Representatives of the State of Texas, resided in Liberty County, Texas and was a strong potential candidate for Governor of the State of Texas as were other high State officials named in this suit.

(21) After the indictment an June 14, 1973 and the arrest of J. D. Farrar on June 15, 1973, Artesia Hall continued to operate.

(22) On June 20, 1973, Lieutenant Governor William P. Hobby, Jr., met with Raymond W. Vowell, Commissioner of Public Welfare, and Jerome Chapman, Deputy commissioner, and demanded the closing of Artesia Hall.

(23) On June 20, 1973, without factual or legal basis and submitting only to political pressure, Raymond W. Vowell decided to begin proceedings to close Artesia Hall even though Raymond W. Vowell well knew that the investigation being conducted by agents of the Department of Public Welfare was

underway, not concluded but had failed to disclose any grounds for closing.

(24) On June 22, [1973], Lieutenant Governor Hobby, Governor Dolph Briscoe, and other State officials flew to Artesia Hall for what was highly publicized as an inspection of Artesia Hall.

(25) On June 22, 1973, Judge Cain accepted return of additional indictments against J. D. Farrar and Dale Lawson Farrar. Said indictments had no basis in fact.

(26) Thereafter, on June 22, 1973, Dale Lawson Farrar was arrested and held in the Liberty County jail on said indictments. An additional warrant was then outstanding for J. D. Farrar.

(27) On the night of June 22, 1973, Judge Cain signed a temporary order restraining Aston Educational Foundation, et al, from operating Artesia Hall and ordered its seizure by the Texas Department of Mental Health and Mental Retardation. This Ex Parte Order was granted without notice to J. D. Farrar and without the need for Ex Parte proceedings since the facts both before and after the closing showed no clear and present danger to students at Artesia Hall at that time, particularly since all, indictments concerned allegations of offense purportedly occurring in August, October, and November, 1972, and not later, a circumstance well known to Judge Cain at the time.

(28) Prior to a further hearing on June 28, 1973, Judge Cain advised counsel then appearing for J. D. Farrar, that he was going to order the continued closing of Artesia Hall regardless of what came out in the hearing. There had, to that point, been no adversary proceedings giving basis for Judge Cain's premature decision.

(29) On June 28, 1973, Judge Cain ordered the continued closing of Artesia Hall pending a hearing on a permanent injunction. The order recites that this action was agreed upon by counsel for all parties.

VI.

Notwithstanding that under the Constitution and Laws of the State of Texas, the Defendants were empowered and duly authorized to prevent or aid in preventing the denial of equal protection of the laws and Constitution of the United States, the Defendants, individually and severally, jointly, and in concert, wrongfully neglected to prevent the commission of wrongs, including malicious prosecution, against Plaintiff Joseph Davis Farrar and Plaintiff Dale Lawson Farrar.

VII.

The conduct of the Defendants included wilfully acting or omitting to act in concert, to maliciously and without due process close Artesia Hall, and to deprive the Plaintiff, Joseph Davis Farrar, of his right (a) to practice his chosen profession and livelihood, (b) to operate Artesia Hall, a child care facility licensed by the State of Texas, and (c) to improve the quality of Artesia Hall by having both white and black American students enrolled and taught in schools of the Tarkington School District. Said conduct of the Defendants also included the malicious prosecution of Plaintiff Joseph Davis Farrar on June 15, 1973, and when that act did not cause Artesia Hall to collapse, the Defendants proceeded to maliciously prosecute Plaintiff Dale Lawson Farrar on June 22, 1973, and to indict Plaintiff Joseph Davis Farrar on new charges along with Plaintiff Dale Lawson Farrar, all of these acts being in violation of the Fourth, Fifth, Sixth, and

Fourteenth Amendments of the Constitution of the United States.

VIII.

Plaintiffs allege that as a direct and proximate consequence of the illegal, wrongful, unconstitutional acts and omissions of the Defendants, both individually and acting together, both jointly and severally, as described in Paragraphs IV and V of this Complaint, they, the Plaintiffs have suffered humiliation, embarrassment, metal suffering, mental anguish, distress, public humiliation, ridicule, loss of property, and loss of liberty. Plaintiff Joseph Davis Farrar's income has dropped drastically and continues to be woefully low. Plaintiff Dale Lawson Farrar was unemployed for some nine months, was turned down by many prospective corporate employers, and was never sent out on an interview by the Texas Employment Commission, all because of his indictment. Plaintiffs have been required to spend substantial sums of money in legal and medical fees. Plaintiff Joseph Davis Farrar claims damages to the date of this suit in the amount of $1,500,000.00 and $10,000,000.00 exemplary damages against the Defendants, jointly and severally. Plaintiff Dale Lawson Farrar claims damages to the date of this suit in the amount of $500,000.00 and $5,000,000.00 exemplary damages against the Defendants, jointly and severally.

WHEREFORE, Plaintiff Joseph Davis Farrar respectfully prays that this Court enter Judgment for him and against the Defendants herein, while acting under color of law in their individual and not their official capacities, jointly and severally, in the total amount of ELEVEN MILLION FIVE HUNDRED [THOUSAND] DOLLARS ($11,500,000.00),

including damages and exemplary damages, all costs of Court expended by this Plaintiff, and reasonable attorney's fees, together with whatever other relief to which he may show himself to be entitled.

Plaintiff Dale Lawson Farrar respectfully prays that this Court enter Judgment for him and against the Defendants herein, while acting under color of law in their individual and not their official capacitates, jointly and severally, in the total amount of FIVE MILLION FIVE HUNDRED THOUSAND DOLLARS ($5,500,000.00), including damages and exemplary damages, all costs of Court expended by this Plaintiff, and reasonable attorney's fees, together with whatever other relief to which he may show himself to be entitled.

Respectfully submitted,

HARRISON & JORDAN
814 Leopard Street
Corpus Christi, Texas 78401
(512) 883-8833

(Filed 5/5/82)
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH DAVIS FARRAR, and DALE LAWSON FARRAR	§ § §	CA NO. 75-H-987
VS.	§ §	
CLARENCE D. CAIN, RUTH URMY, WILLIAM P. HOBBY, JR., RAYMOND W. VOWELL, LONNIE A. GRUVER, and ARTHUR J. HARTEL, III	§ § § § § § § §	

DEFENDANTS' AMENDED ANSWER

COME NOW Clarence D. Cain, Ruth Urmy, William P. Hobby, Jr., Raymond W. Vowell and Lonnie Gruver, defendants herein, and file this their Fourth Amended Answer and would respectfully show the following:

I.

Defendants deny the material allegations contained in paragraph I of Plaintiff's Second Amended Complaint, and specifically deny that said complaint states a cause of action cognizable under 42 U.S.C. §1983.

II.

Defendants deny the material allegations contained in paragraph II of Plaintiffs' Second Amended Complaint, and specifically deny that said complaint states a cause of action that is cognizable under the statutes referred to therein.

III.

Defendants do not have sufficient knowledge to admit or deny the allegations contained in paragraph II as such allegations pertain either to Plaintiffs or to other Defendants herein. Defendant Clarence D. Cain admits that he is a resident of Liberty, Liberty County, Texas, and is and was in 1973 Judge of the 75th Judicial District Court of the State of Texas; the Defendant William P. Hobby, Jr. admits that he is a resident of Houston, Harris County, Texas, and is and was in 1973 Lieutenant Governor of the State of Texas; the Defendant Raymond W. Vowell admits that he was a resident of Austin, Travis County, Texas, and was in 1973 a Commissioner of Public Welfare of the State of Texas; and Defendant Ruth Urmy admits that she is a resident of Houston, Harris County, Texas, and was in 1973 an employee of the State Department of Public Welfare. Except as admitted above, these Defendants deny the material allegations of paragraph III of Plaintiffs' Seconded Amended Complaint.

IV.

Defendants deny the material allegations of Paragraph IV of Plaintiffs' Second Amended Complaint.

V.

Defendants deny the material allegations of paragraph V of Plaintiffs' Second Amended Complaint as they pertain to these Defendants, and specifically deny any of these Defendants' actions or conduct with regard the subject matter of Plaintiffs' Second Amended Complaint were done in bad faith or with any malicious intent toward the Plaintiffs or any other person, and deny that they constitute, separately or when considered together, any deprivation of the rights, privileges, or immunities of any person secured by the Constitution or Laws of the United States.

VI.

Defendants deny the material allegations of paragraph VI of Plaintiffs' Second Amended Complaint.

VII.

Defendants deny the material allegations contained in paragraph VII of Plaintiffs' Second Amended Complaint.

VIII.

Defendants deny the material allegations contained in paragraph VIII of Plaintiffs' Second Amended Complaint, and specifically deny that either of the Plaintiffs is entitled to any of the relief sought therein.

FIRST DEFENSE

Defendants claim the immunity granted by the Eleventh Amendment to the Constitution of the United States and by the common law of the State of Texas to them as officials of the State of Texas.

SECOND DEFENSE

Plaintiffs' asserted cause of action is in whole or in part barred by the Texas one-year statute of limitations, article 5524, Vernon's Texas Civil Statutes, and by the Texas two-year statute of limitations, article 5526, Vernon's Texas Civil Statutes.

THIRD DEFENSE

Defendants specifically deny that they or any one of them subjected any person or cause any person to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution or Laws of the United States of America. These Defendants have had as their sole motivation the enforcement of the laws of the State of Texas and particularly those having to do with the licensing of child care facilities and would show that at no time have they done any act that violated any rights of Plaintiffs' or gave rise to any cause of action in Plaintiffs' against them or either of them for damages, and that at all times the Defendants acted in good faith. Defendants Gruver, Hobby, Vowell and Urmy therefore are entitled to the defense of executive immunity in this suit because they acted reasonably and in good faith under the circumstances in accordance with the demand and responsibilities of their respective offices. Defendant Cain is therefore entitled to judgment herein because of the doctrine of judicial immunity.

FOURTH DEFENSE

Plaintiffs have alleged that they were deprived of liberty and property without due process, inter alia, because an order granting a temporary injunction was entered on June 28, 1973. There was an Agreed Order signed by counsel for all parties. Plaintiffs were then and are now bound by the actions taken by their

counsel and as a result have waived any right to bring this claim against these defendants. In the alternative, collateral estoppel precludes the litigation of this particular claim.

WHEREFORE, PREMISES CONSIDERED, these Defendants pray as they have heretofore prayed and further pray that upon final hearing and trial of this suit, and that they be granted such other and further relief to which they may show themselves justly entitled, and for which they may ever pray.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

(5)

No. 91-990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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April 1992

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QUESTION PRESENTED

Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?

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IN THE

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**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Fifth Circuit's first opinion directed the award of nominal damages to petitioners. *Farrar v. Cain*, 756 F.2d 1148 (5 Cir. 1985) (Pet. App. 2). On remand, the district court awarded attorney's fees to petitioners in an unreported memorandum and order (Pet. App. 12, 13, 29).

The Fifth Circuit's second opinion reversed, concluding that plaintiffs who recover nominal damages for federal civil rights violations are not "prevailing parties," and therefore are not entitled to attorney's fees under 42 U.S.C. § 1988, because they have gained only "a *de minimis* or technical victory." *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5 Cir. 1991) (Pet. App. 30).

JURISDICTION

The opinion and judgment of the court of appeals were entered on September 17, 1991 (Pet. App. 30, 46). The petition for certiorari was filed within 90 days thereafter and was timely. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended (Pet. App. 47).

STATEMENT OF THE CASE

Joseph Farrar and his son Dale sued Respondent William P. Hobby, then Lieutenant Governor of Texas, and other public officials under 42 U.S.C. § 1983.[1] They alleged, among other claims, that the defendants violated their right to procedural due process of law by illegally closing a school they operated in Liberty County, Texas. The jury returned a verdict finding that Hobby violated Joseph Farrar's federal due process

[1] Joseph Farrar died before trial. Petitioners, as co-administrators of his estate, were ordered substituted as plaintiffs under F.R.Civ.P. 25(a) (Pet. App. 1).

rights under color of state law, but awarded no damages for that violation (Special Interrogatories 7 and 8, Brief in Opposition at A-3). The district court entered a take-nothing judgment on the jury's verdict.

Relying on *Carey v. Piphus*, 435 U.S. 247 (1978), the Fifth Circuit reversed:

> Even when a violation of a civil right causes no actual injury to the plaintiff, the plaintiff is entitled to recover nominal damages. We have awarded nominal damages, not to exceed one dollar, when an infringement of a fundamental right was shown and we have also held that, once a jury has found a violation of a plaintiff's civil rights, it "could not ignore that finding in calculating damages. Violation of [the plaintiff's] constitutional rights was, at a minimum, worth nominal damages."[2] Because the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not to do so when the Farrars so moved in their motion for a new trial.

Farrar v. Cain, 756 F.2d 1148, 1152 (5 Cir. 1985) (footnotes and citations omitted) (Pet. App. 10).

On remand, petitioners filed an application for attorney's fees under 42 U.S.C. § 1988. Following a lengthy hearing, the district court awarded to them

[2] *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5 Cir. 1982), *vacated and remanded on other grounds*, 735 F.2d 838 (5 Cir. 1984), *aff'd in part and rev'd in part*, 739 F.2d 993 (5 Cir. 1984).

against Hobby $280,000.00 in attorney's fees, $27,932.00 in costs and expenses, and prejudgment interest on the expenses (Pet. App. 12).

Hobby appealed. A different panel of the Fifth Circuit, one judge dissenting, reversed the fee award, holding that petitioners were not "prevailing parties" within the meaning of 42 U.S.C. § 1988. The Fifth Circuit acknowledged that "[o]ur holding today conflicts with opinions of the Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits." 941 F.2d at 1316 (Pet. App. 41). It conceded the principle, established by *Carey v. Piphus*, 435 U.S. 247 (1978), that "[a] violation of constitutional rights is never *de minimis*," because it is never "so small or trifling that the law takes no account of it." 941 F.2d at 1315, quoting *Lewis v. Woods*, 848 F.2d 649, 651 (5 Cir. 1988) (Pet. App. 40).

Nonetheless, without citing or mentioning *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the panel majority interpreted *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988) collectively to mean that a civil rights plaintiff recovering nominal damages has attained only a *de minimis* or technical victory, and therefore is not a "prevailing party" under § 1988. 941 F.2d at 1316 (Pet. App. 41). The majority reasoned that a plaintiff "prevails" within the meaning of § 1988 only when the final decision "secures some of the relief sought by the plaintiff in bringing the suit." 941 F.2d at 1317 (Pet. App. 45). Concluding that "the recovery of one dollar is no victory under § 1988," the majority held that "the plaintiff's victory, *as measured by the*

success actually obtained, was merely a *de minimis* or technical success." 941 F.2d at 1315-16 (footnote omitted; emphasis added) (Pet. App. 40-41).[3]

Petitioners did not seek panel rehearing or suggest rehearing en banc. Because its decision created an intercircuit conflict, the Fifth Circuit "circulated the opinion to the entire court as required by the court's policy. No member of the court has requested en banc consideration." 941 F.2d at 1316 n. 22 (Pet. App. 41).

SUMMARY OF THE ARGUMENT

1. The petitioners won this litigation. Hobby lost. The nominal damages awarded "change[d] the legal relationship" that existed between Hobby and the petitioners before the trial began, *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-92 (1989) and constituted "at least some relief on the merits of [petitioners'] claim. . ." *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987).

A plaintiff who obtains a jury verdict that his federal constitutional rights have been violated, and who thereby is entitled at least to nominal damages, *Carey v. Piphus*, 435 U.S. 247 (1978), cannot rationally be characterized as a *losing* party, no more than the defendant who lost the verdict and judgment can be declared the winner. Such plaintiffs "prevail" within the meaning of § 1988 by establishing important legal or constitutional principles that are wholly independent of the amount of money at stake. That

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[3] The panel did not consider or decide Hobby's alternative contention that the amount of the attorney's fees awarded was not "reasonable," in the sense demanded by § 1988. That question therefore is not before this Court.

result is significant because it deters similar violations by other public officials or governmental entities, and encourages counsel who contemplate prosecuting or defending civil rights litigation to evaluate the probabilities of success in terms of the constitutional principle at stake, rather than the amount of money at issue. Congress intended precisely that result.

This Court's previous decisions, and those of virtually all other federal courts of appeals, strongly reinforce the view that the amount of a civil rights damages award is relevant only to an assessment of the reasonableness of attorney's fees awarded under § 1988. It does not and cannot determine whether such fees are recoverable at all. *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 792-93 (1989). Congress has rejected a rigid rule of proportionality between damages awarded and attorney's fees recoverable. *City of Riverside v. Rivera*, 477 U.S. 561 (1986). This principle, and the Court's insistence that all violations of federal rights must be compensable in *some* amount, *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978), establish that nominal damages awards necessarily must support recovery of attorney's fees in *some* amount under § 1988.

The purposes served historically by an award of nominal damages are consistent with the policies underlying § 1988's authorization of reasonable attorney's fees. Nominal damages awards vindicate principle by affirming that one party has been wronged by another. They establish benchmark standards of appropriate and acceptable behavior, stigmatize unlawful misconduct, and encourage peaceful settlement of grievances by resort to the judicial

process. Awards of nominal damages serve as a powerful incentive to meritorious litigation in which the injuries sustained are not or may not be compensable in money. In the same sense, awards of attorney's fees under § 1988 encourage litigation in which the probability of establishing a violation of federal rights may be substantial, but the possibility of recovering significant monetary relief may be remote or nonexistent. Again, Congress contemplated precisely that outcome.

2. Congress meant for nominal damages to support the award of reasonable attorney's fees. The legislative history of the 1976 amendment to § 1988 confirms that view.

Congress wanted to deter violations of federal rights by assuring that officials who disregard the nation's fundamental laws could not do so with impunity. Rights that are non-pecuniary in nature are as deserving of protection as those whose infringement results in significant money damages. Section 1988 assures that those who despoil the Constitution will pay the full social cost of their misconduct, which includes making victims whole for the costs of obtaining relief. Congress also envisioned a return to pre-*Alyeska* practice, which routinely included recovery of attorney's fees in nominal damages cases. Finally, Congress intended that victims of civil rights abuses should receive the same protection afforded to victims of anti-trust violations, which includes payment of their attorney's fees when only nominal damages are awarded.

3. Nominal damages awards traditionally have supported the award of costs to prevailing plaintiffs,

both at common law and in state and federal courts. Attorney's fees recoverable under § 1988 are deemed by Congress and this Court to constitute "costs." They should therefor be subject to the same principles that historically have governed awards of all other costs.

ARGUMENT

1. The petitioners "prevailed," in the sense intended by Congress in § 1988, by winning a jury verdict that entitles them to nominal damages.

Congress has provided in § 1988 that in civil rights cases the district court, in its discretion, "may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Plaintiffs "prevail" for purposes of the statute by succeeding on "any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit." *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-92 (1989) and *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1 Cir. 1978).

Hobby escaped having to pay large damages for the violation of federal rights he inflicted, but he did not win the case. The petitioners obtained a specific jury finding that Hobby violated Joseph Farrar's federal civil rights while acting under color of state law. That verdict entitled them to a judgment for at least nominal damages. *Carey v. Piphus*, 435 U.S. 427 (1978). The Farrars succeeded on significant issues in the litigation that were unrelated to money. As the district court held in its memorandum on attorney's fees (Pet. App. A-18, 22, 28):

> A constitutional violation by a public official is no less repugnant to our system simply because the injury is not redressable by money damages. . . Requesting money damages in a civil rights suit is a means to an end; that the substantial damages that are requested are not ultimately awarded does not mean that important constitutional rights have not been vindicated. . . [T]hat the plaintiffs can trace no revolution in public administration by reason of this case does not diminish the contribution that is made by people who force public officials to comply with the law. It is not just the family name of the Farrars and the protection of the Farrars from an excessive government that has been accomplished here. The protection extends to all Americans.
>
> In short, the Farrars won. Hobby lost.

It would be anomalous to maintain that a defendant against whom nominal damages have been awarded is a "prevailing party."[4] The court-imposed obligation on

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[4] Self-evidently Hobby is not the prevailing party in this litigation. Having lost both the jury verdict and the appeal that authorized the award of nominal damages against him, he could not now plausibly assert entitlement to recover witness and filing fees, deposition costs, and related expenses of litigation from the plaintiffs under 28 U.S.C. §§ 1821 and 1920 and F.R.Civ.P. 54(d). *Cf. Quarles v. Oxford Municipal Separate School Dist.*, 868 F.2d 750, 758 (5 Cir. 1989) (Rule 54(d) does not authorize award of costs to non-prevailing party).

Likewise, Hobby cannot resist payment of the nominal damages assessed simply by claiming that the amount is too

Hobby to pay such damages "change[d] the legal relationship" that existed between the petitioners and him before the trial began, *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 791-92 (1989) and constituted "at least some relief on the merits of [petitioners'] claim. . ." *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

Civil rights plaintiffs "prevail" under § 1988 when they "succeed on *any* significant issue in the litigation which achieves *some* of the benefit . . . sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (emphasis added). A judgment awarding even nominal damages reflects "the importance to organized society that [constitutional] rights be scrupulously observed. . ." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The actual injury and the amount awarded may be trivial or insignificant. The principle at stake is not.

The district court based its award of attorney's fees on the decision in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). The Fifth Circuit's opinion does not discuss or cite that case. There a plurality of the Court "[rejected] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers," 477 U.S. at 574-76, "because damages awards do not reflect fully the public benefit advanced by civil rights litigation . . . Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money

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trivial to be of concern to him. The fact that the amount of a legally enforceable debt is insignificant does not mean it is not owed.

damages." *Id.* at 575, 576. Justice Powell joined that conclusion in a concurring opinion. 477 U.S. at 581, 585: "Neither the decisions of this Court nor the legislative history of § 1988 support [a rule of proportionality]."

The Court in *Rivera* repudiated the idea that entitlement to reasonable attorney's fees under § 1988 is necessarily contingent upon the amount of damages awarded, or that attorney's fees can be denied altogether simply because the compensable constitutional injury may seem slight. "A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988." 477 U.S. at 578.

The understanding that limited damages recoveries would not defeat entitlement to fees altogether was underscored in *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989). There the Court explained that "the degree of the plaintiff's success . . . is a factor critical to the determination of the *size* of a reasonable fee, not to *eligibility* for a fee award at all." 489 U.S. at 789 (emphasis added). The Fifth Circuit simply ignored *Garland*'s square holding that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in [§ 1988]. Where such a change has occurred, the *degree* of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, *not to the availability of a fee award vel non.*" 489

U.S. at 792-93 (emphasis added); *Hensley v. Eckerhart*, 461 U.S. at 430 ("the level of a plaintiff's success is relevant to the amount of fees to be awarded").

The jury verdict in petitioners' favor, and the resulting judgment for nominal damages to which it entitled them, obviously "changed the legal relationship of the parties." A "material alteration of the legal relationship of the parties" does not mean "a material change in the *financial* relationship of the parties." The jury determined that Hobby was a constitutional tortfeasor and had violated Dr. Farrar's right to due process of law under the Constitution of the United States. As the district court's memorandum opinion makes clear, that was the real victory in this case, and its importance is not diminished by the fact that only nominal damages were awarded or that petitioners could not prove greater damages to the jury's satisfaction.

The Fifth Circuit majority believed that an award of nominal damages neither "change[s] the legal relationship" between the parties, nor "secures some of the relief sought by the plaintiff in bringing the suit," 941 F.2d at 1317 (Pet. App. 45), but instead constitutes "merely a *de minimis* or technical success." 941 F.2d at 1316 (Pet. App. 41). The decisions on which the Fifth Circuit relied, *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1 (1988) and *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989), do not support that conclusion.

In *Hewitt* the plaintiff obtained only "a favorable judicial statement of the law in the course of litigation that [resulted] in judgment *against the plaintiff*," who

otherwise "obtained no relief." 482 U.S. at 760, 763 (emphasis added). Here judgment was for the petitioners, not Hobby. In *Rhodes* "[t]he case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." 488 U.S. at 4. Here the plaintiffs are entitled to judgment, and the case is not moot. Petitioners "secured some of the relief sought" — a favorable judgment for damages based on a jury finding supporting their constitutional claim. In light of *City of Riverside v. Rivera*, *Carey v. Piphus*, and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n. 11 (1986), an award of nominal damages cannot plausibly be characterized as "no relief whatsoever."

The Court suggested *in Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782, 792 (1989) that attorney's fees might be denied "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*." *Garland* cites as an example of "technical or *de minimis*" success the trial court's ruling in that case that a school district policy was unconstitutionally vague, even though there was no evidence it had ever been applied to the plaintiffs. Petitioners attained far more than such a meaningless, non-compensable victory. Here the jury's verdict explicitly found that "Defendant Hobby committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States . . ."

Neither Congress nor this Court has ever implied that an actual deprivation of a federal right is unworthy of redress, as opposed to a potential, theoretical infringement that has never occurred, that may never

materialize, and that would not support a nominal damages award in any event. Characterizing as "purely technical or *de minimis*" a civil rights plaintiff's success in obtaining nominal damages for an acknowledged violation of the constitutional right to due process of law is incompatible with this Court's characterization of that right as "central to our system of ordered liberty." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986). It is irreconcilable with *Rivera*'s central premise that recovery of attorney's fees in federal civil rights cases is not dependent upon "obtaining substantial monetary relief." It is, finally, fundamentally inconsistent with this Court's insistence in *Carey v. Piphus* that a nominal damages award is not some arcane ceremonial formality but an indispensable recognition of the fact that organized society demands "scrupulous" observance of federal rights by government officials. 435 U.S. at 266. In this country, at least, there are no *de minimis* constitutional deprivations.

The Fifth Circuit never reached or even intimated its position on the question of whether the attorney's fees awarded by the district court were "reasonable," in the sense demanded by § 1988. It did not decide whether the award should have been modified or reduced. Instead, it imposed an absolute bar to the recovery of *any* attorney's fees, in *any* amount, by *any* plaintiff awarded only nominal damages, in *any* federal civil rights case in *any* United States district court within the Fifth Circuit.

In essence, the Fifth Circuit has reverted to its pre-*Garland* posture by making the test for entitlement to attorney's fees in that circuit dependent upon a judge's

assessment of the subjective motivation of the parties in bringing the lawsuit. If Farrar had sought only nominal damages from the outset, rather than asking for $17 million, presumably he would have been entitled to attorney's fees under the Fifth Circuit's approach, because he would have obtained all the relief he sought. It is apparently only because petitioners asked the jury to award substantial monetary damages, and did not recover them, that the Fifth Circuit concludes they have forfeited their right to obtain any attorney's fees at all.[5]

Such a rule, turning on a determination of a civil rights plaintiff's real, true, or predominant objective in bringing suit, is squarely at odds with *Garland*. There the Court condemned "creating such an unstable threshold to fee eligibility" as "wholly irrelevant to the purposes behind the fee shifting provisions" of § 1988. 489 U.S. at 791. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). It is not simply to obtain large amounts of money for people whose federal rights have been violated. Accomplishing the congressional objective thus is not determined by the damages a jury awards:

> [A]n undesirable emphasis [should not] be placed on the importance of recovery of damages in civil rights litigation. The intention of Congress was to encourage successful civil

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[5] The Fifth Circuit's decision denies not only attorney's fees but all other costs as well. Thus, under that holding, a plaintiff recovering only nominal damages is likewise disentitled to recover expenses of litigation under 28 U.S.C. §§ 1821 and 1920.

> rights litigation, not to create a special incentive to prove damages . . . Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the actions seeks monetary damages.

Blanchard v. Bergeron, 489 U.S. 87, 95-96 (1989).

Federal courts of appeals consistently have held that judgments for nominal damages are sufficient to support reasonable attorney's fees awards under § 1988.[6] Indeed, this Court said as much in footnote 11 of *Carey v. Piphus*: "We also note that the potential liability of § 1983 defendants for attorney's fees, see Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, provides additional — and by no means inconsequential — assurance that agents of the State

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[6] *Romberg v. Nichols*, 953 F.2d 1152 (9 Cir. 1992); *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2 Cir. 1991); *Smith v. DeBartoli*, 769 F.2d 451, 453 (7 Cir. 1985) (dictum), *cert. denied* 475 U.S. 1067 (1986); *Coleman v. Turner*, 838 F.2d 1004, 1005 (8 Cir. 1988); *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9 Cir. 1988); *Nephew v. City of Aurora*, 830 F.2d 1547 (10 Cir. 1987) (en banc), *cert. denied* 485 U.S. 976 (1988); *Garner v. Wal-Mart Stores; Inc.*, 807 F.2d 1536, 1539 (11 Cir. 1987); see also *Burt v. Abel*, 585 F.2d 613, 617-18 (4 Cir. 1978); *Tedesco v. City of Stamford*, 24 Conn.App. 377, 588 A.2d 656, 659 (1991) (dictum); *but see Spencer v. General Electric Co.*, 894 F.2d 651, 662 (4 Cir. 1990) (dictum); *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881, 882-83 (1985), *cert. denied* 474 U.S. 989 (1985) (Justice White dissenting).

will not deliberately ignore due process rights [even though their violation may lead only to nominal damages]." 435 U.S. at 257.

Moreover, in *City of Riverside v. Rivera*, 477 U.S. at 576 n. 8, the plurality cited with approval several lower court cases in which attorney's fees had been awarded following assessment of nominal damages: *McCann v. Coughlin*, 698 F.2d 112, 128-29 (2 Cir. 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1220 (5 Cir. 1982); and *Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1 Cir. 1979). Indeed, the Fifth Circuit itself frequently approved fee awards in nominal damages cases both before and after *Texas State Teachers Ass'n v. Garland Ind. School Dist.* See *Basiardanes v. City of Galveston*, *supra*; *Ryland v. Shapiro*, 708 F.2d 967, 976 (5 Cir. 1983); *Fyfe v. Curlee*, 902 F.2d 401, 406 (5 Cir. 1990); *cf. Cobb v. Miller*, 818 F.2d 1227, 1233 (5 Cir. 1987) (refusing to permit reduction of fees because plaintiff recovered only "comparatively nominal damages").

Thus, even after *Garland*, the Fifth Circuit had explicitly rejected the proposition that nominal damages awards represent only *de minimis* success on the merits of federal civil rights claims. The rationale of these cases was articulated in *Harkless v. Sweeny Ind. School Dist.*, 466 F. Supp. 457, 473 (S.D. Tex. 1979), *aff'd* 608 F.2d 594 (5 Cir. 1979):

> Even if each of the plaintiffs had within a very short period of time obtained a better paying job and the back pay was thus nominal, the vindication of principles for which these plaintiffs and their attorneys struggled would have been extremely important. The plaintiffs

and their counsel were struggling in this case not for a few dollars in back pay, but for vindication of their right to equal treatment. Plaintiffs' self-esteem and professional reputations were in issue — not just dollars.

* * *

From the stand-point of the plaintiffs, it can accurately be stated that the fact of recovery, and the fact that their right to equal treatment has been judicially vindicated, are much more significant than the amount of recovery. Accordingly, in the court's judgment, this is not a case in which the value of counsel's services or their compensation may be fixed by an arbitrary or an adjusted percentage of the recovery effected for the plaintiffs.[7]

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[7] In affirming *Harkless*, the Fifth Circuit observed that

> the plaintiffs not only recovered back pay, which was minimal since most were able to quickly secure new employment, but also had the satisfaction of vindicating their professional status, which defendants, to put it mildly, had impugned. . . In any case [§ 1988] provides that a 'prevailing party' should receive attorney's fees when the trial court deems it appropriate, and does not limit those fees to the amount recovered by the plaintiff. The purpose of the Attorney's Fees Awards Act — to encourage private enforcement of the civil rights laws — would be thwarted by [limiting fee awards to a proportion of the total recovery], and no such restriction is suggested by the legislative history of the Act.

608 F.2d at 598 (citations omitted).

Precisely such considerations are presented here. As the district court explained (Pet. App. A-23, 24, 25),

> Hobby cannot belittle the important victory secured by Dale Farrar of clearing his family name . . . [and discouraging] state officials from overstepping the bounds of responsibility entrusted to them. Awarding attorney's fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions. . . [T]he cumulative effect of meritorious civil rights litigation eventually deters impermissible conduct by government officers and the expenditure of thousands of taxpayer dollars stubbornly to defend their misconduct. . . The Farrar' suit was not as much a case about money — although this issue was inextricably entwined with the substantive claims — as it was about the legality of the actions of six state officials. . . .

Nominal damages are not a mere ceremonial formality:

> Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. . . [B]ecause of the importance to organized society that procedural due process be observed, . . . the denial of procedural due process [is] actionable for nominal damages without proof of actual injury.

Carey v. Piphus, 435 U.S. 247, 266 (1978).

Nor is it unfair to award reasonable attorney's fees on the basis of a nominal damages recovery simply because of the wholly fortuitous circumstance that the defendant's constitutional violation did not inflict substantial injury on the plaintiff.[8] One of the principal purposes of § 1988 is to vindicate federal rights, wholly apart from the amount of money in controversy or the degree of harm involved. Defendants found to have violated those rights should be accountable for the costs, including reasonable attorney's fees, that would be awarded as a matter of course if the injury inflicted were substantial.

In sum, "[i]n the realm of civil rights, where Congress and the courts historically have sought to encourage the vindication of society's most cherished principles for their own sake, a nominal damages award does not a nominal victory make." *Romberg v. Nichols*, 953 F.2d 1152, 1159 (9 Cir. 1992). A civil rights plaintiff who secures such an award has won the case and is a "prevailing party" within the meaning of § 1988.

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[8] F.R.Civ.P. 68 and *Marek v. Chesny*, 473 U.S. 1 (1985) would have permitted Hobby to "have avoided liability for the bulk of the attorney's fees for which [he] now finds [himself] liable by making a reasonable settlement offer in a timely manner." *City of Riverside v. Rivera*, 477 U.S. 580 n. 11. Of course, if Hobby had allowed judgment to be taken against him under Rule 68, even for a dollar, that concession would have constituted a material change in the legal relationship of the parties, entitling the plaintiffs to reasonable attorney's fees incurred before the offer of judgment was made.

2. The language and legislative history of § 1988 evidence a clear congressional purpose to authorize reasonable attorney's fees awards as part of the costs in civil rights cases, even when only nominal damages are recovered.

Congress was acutely aware when it amended § 1988 by enacting the Civil Rights Attorney's Fees Awards Act of 1976 that, in many civil rights cases, the relief at issue is worth less, in monetary terms, than the cost of litigating the claim. H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at p. 9. It has authorized the allowance of sufficient compensation to encourage the litigation of meritorious claims, as a matter of national policy, even if the money damages realistically to be won would not otherwise be sufficient to attract competent counsel or to justify a lawsuit at all:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at p. 2, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at p. 5910.

This Court consistently has recognized and implemented this congressional policy. "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in

monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986), quoted in *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989). "Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Hensley v. Eckerhart*, 461 U.S. 424, 444 n. 4 (1983). A plaintiff in federal civil rights litigation acts "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority," *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), and "often secures important societal benefits that are not reflected in nominal or relatively small damage awards." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).[9] Accordingly, "Congress did not intend for fees in civil rights litigation, unlike those is most private law cases, to depend on obtaining substantial monetary relief." *Id.* at 575.

Moreover, the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 establishes that Congress intended to restore civil rights attorney's fees awards to their status prior to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *See*

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[9] Particularly after *City of Riverside v. Rivera*, Congress has been on notice that attorney's fees in civil rights cases need not be proportional to the amount of damages awarded. It has had a fair opportunity to amend § 1988 but has not done so. Congressional efforts to curtail attorney's fees awards that are disproportionate to the damages recovered consistently have failed. See proposed Legal Fees Equity Act, S. 2802, 98th Cong., 2d Sess. (1984), S. 1580, 99th Cong., 1st Sess. (1985); S. 133, 102nd Cong., 1st Sess. (1991).

Senate R. No. 94-1011 at p. 4; H.R. No. 94-1558, 94th Cong., 2d Sess. at p. 2. Federal courts prior to *Alyeska* routinely awarded attorney's fees on judgments for nominal damages.[10] It is a fair presumption that

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[10] See, e.g., *Skehan v. Bd. of Trustees*, 501 F.2d 31 (3 Cir. 1974), *vacated* 421 U.S. 983 (1975); *Brito v. Zia Co.*, 478 F.2d 1200 (10 Cir. 1973); *Brotherhood of Railroad Signalmen v. Southern Ry. Co.*, 380 F.2d 59 (4 Cir. 1969); *Thonen v. Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974), *aff'd on other grounds*, 517 F.2d 3 (4 Cir. 1975); *Berry v. Macon County Bd. of Education*, 380 F. Supp. 1244 (M.D. Ala. 1971); *Hammond v. Housing Authority*, 328 F. Supp. 586, 588 (D. Ore. 1971); *cf. Knight v. Auciello*, 453 F.2d 852 (1 Cir. 1972) (attorney's fees on $500.00 damages); *Hill v. Franklin County Bd. of Education*, 390 F.2d 583 (6 Cir. 1968) (attorney's fees on $286.80 damages); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972) (Truth in Lending Act attorney's fees awarded on "minimum damages" of $100.00).

Hammond v. Housing Authority is particularly significant because it was specifically described in "Hearings on the Effect of Legal Fees on the Adequacy of Representation before the Subcommittee on Representation of Citizen Interests," Senate Committee on the Judiciary, 93rd Cong., 1st Sess. pt. III, at p. 962 (hereafter, "Legal Fees Report"). The cases compiled in that report were commended in the Senate Report accompanying the Civil Rights Attorney's Fees Awards Act of 1976 for having "remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations." Senate Report at p. 4.

Berry v. Macon County Bd. of Education is also discussed in the Legal Fees Report (p. 937), which informed Congress that attorney's fees had been awarded in that nominal damages case.

Congress amended § 1988 "with this prevailing traditional rule in mind," *Franklin v. Gwinnett County Public Schools*, 503 U.S. ___, 112 S.Ct. 1028, 1036 117 L.Ed.2d 208, 221 (1992), to "stimulate voluntary compliance with the law," *Sable Communications of California v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184, 193 (9 Cir. 1989), and to insure that those who violate the federal civil rights of others pay "the full social costs of their unconstitutional conduct, costs that include litigation as well as the original damages." *Kirchoff v. Flynn*, 786 F.2d 320, 327 (7 Cir. 1986).

Finally, Congress specifically intended that civil rights litigants be treated the same as anti-trust plaintiffs, so far as attorney's fees are concerned. "It is intended that the amount of fee awarded under [the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases . . ." S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at p. 6, reprinted in 1976 U. S. Code Cong. & Admin. News 5908 at p. 5913. "[C]ivil rights plaintiffs should not be singled out for different or less favorable treatment [than anti-trust litigants enjoy]." H.R. No. 94-1558 at p. 9. *Blum v. Stenson*, 465 U.S. 886, 893 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 430 n. 4 (1983). See also Remarks of Mr. Seiberling (original congressional sponsor of the Fees Act): "We should give civil rights victims the same protections we give anti-trust victims." H. 12165, 94th Cong., 2d Sess. (1976).

In anti-trust cases nominal damages judgments have uniformly been understood to be a sufficient victory to support an award of attorney's fees. See, e.g., *United States Football League v. National Football League*,

887 F.2d 408 (2 Cir. 1989), *cert. denied* 493 U.S. 1071 (1990) (award of nominal damages of $1 under Clayton Act, trebled to $3, held to support award of attorney's fees of $5,529,247.25 and taxable costs of $62,220.92); *Morning Pioneer, Inc. v. Bismark Tribune Co.*, 493 F.2d 383 (8 Cir. 1974). Congress could not have been unaware of that treatment when it amended § 1988. That is the rule of decision Congress expressly intended to apply in civil rights cases.

Nothing in the legislative history of § 1988, as amended in 1976, indicates a congressional intention to withhold attorney's fees awards from civil rights plaintiffs who recover nominal damages. Rather, the available evidence convincingly demonstrates precisely the opposite purpose.

3. At common law, and in both state and federal civil litigation, plaintiffs awarded nominal damages historically have been deemed "prevailing parties," entitled to recover costs, in the absence of a statute or rule limiting that recovery.

The Court at least twice has held that attorney's fees under § 1988 are "an item of costs." *Hutto v. Finney*, 437 U.S. 678, 697 (1978); *Marek v. Chesny*, 473 U.S. 1, 7-10 (1985); *cf. White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 448-49 (1982) (recognizing that § 1988 provides for awarding attorney's fees "as part of the costs").[11] At common

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[11] "[A]bsent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, . . . such fees are to be included as costs for purposes of [F.R.Civ.P.] 68." *Marek v. Chesny*, 473 U.S. at 9. *Cf.* F.R.Civ.P. 54(d) ("costs shall be allowed as of

law nominal damages awards historically were deemed to support recovery of costs. "In England the rule was early established that the prevailing party in an action for damages should recover costs, and one who recovered nominal damages was a prevailing party in this sense."[12] Moreover, "[a] plaintiff who recovers nominal damages is the 'prevailing party' under modern statutes giving costs to the 'prevailing party'."[13]

Nominal damage awards originally served in substantial measure as "a peg on which to hang costs." *Hutton & Bourbonnais, Inc. v. Cook*, 173 N.C. 496, 92 S.E. 355, 356 (1917). As one well-known 19th century commentator observed:

> The failure to perform a duty or contract is a legal wrong independent of actual damages to a party for whose benefit the performance of such duty or contract is due. The omission to show actual damages, and the inference therefrom that none has been sustained, do not necessarily render the case trivial. The law has regard for the substantial rights of parties, though it may overlook trivial things. When such right is violated, the maxim *de minimis non curat lex* has no application. The court will add nominal damages to the finding of a jury when necessary to such rights, as in the

course to the prevailing party unless the court otherwise directs").

[12] C. McCormick, Handbook on the Law of Damages § 24 at 93 (1935) (footnotes omitted).

[13] *Id.*

> instance to carry costs. So judgment which should have been given for a plaintiff for nominal damages, but was rendered for the defendant, will be reversed, if such damages will entitle the plaintiff to costs . . .

J. G. Sutherland, A Treatise on the Law of Damages at 13-14 (2 ed. 1883).[14]

Early federal decisions likewise recognize that an award of nominal damages supports the assessment of costs. For example, in *Forrest v. Hanson*, 9 Fed. Cas. 456, 458-59 (C.C.D.C. 1802) (No. 4,943), the plaintiff accused the defendant of slandering him by calling him "a liar and a swindler." The jury found for the plaintiff and awarded nominal damages of one cent. Finding that no statute limited recovery of costs in such circumstances, the court held "the plaintiff ought to have his judgment, with full costs."

Similarly, in *Merchant v. Lewis*, 17 Fed. Cas. 37 (C.C.S.D. Ohio 1857) (No. 9,437), an action for patent infringement, the jury returned a verdict for nominal damages of five dollars, and the trial court entered a judgment for that amount, "including full costs." The court rejected the defendant's claim that a judgment for nominal damages did not authorize a judgment for costs:

> The right of the plaintiff to costs follows from a verdict in his favor for any amount of damages, whether nominal or compensatory, . . . A

[14] See also J. Stein, Damages and Recovery § 178 at 349 (1972) ("of course, the verdict for nominal damages carries with it the right to recover costs"); D. Dobbs, Law of Remedies § 3.8 at 193 (1973)

> verdict for damages, whatever may be the amount, implies that the defendant has been a wrong-doer. . . and such a verdict will carry costs. It is not a just inference . . . that because nominal damages are found by the jury, the action is necessarily frivolous or vexatious.

This Court repeatedly has sustained the recovery of costs on a verdict and judgment for nominal damages. See *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *Keystone Mnfg. Co. v. Adams*, 151 U.S. 139 (1894); *Dow v. Humbert*, 91 U.S. 294 (1876); *North Missouri R. Co. v. Maguire*, 87 U.S. 46 (1873); *Conard v. Pacific Ins. Co. of New York*, 6 Pet. 262, 282 (1832); *see also Woodrow v. Coleman*, 39 F. Cas. 517 (C.C.D.C. 1804) (No. 17,984) (breach of contract; damages of one cent; court gave judgment "with full costs"). Since attorney's fees under § 1988 are costs, they should likewise be recoverable.

As Professor McCormick has observed, many states have modified this traditional principle by statute or rule, limiting or qualifying the costs recoverable if only nominal damages are awarded.[15] Congress has not done that, but instead has chosen to allow recovery of reasonable attorney's fees whenever a plaintiff, as the "prevailing party," is entitled to recovery of costs.

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[15] C. McCormick, §24 at 94. Of course, Congress quite properly could limit or deny altogether recovery of attorney's fees or any other costs in civil rights cases where only nominal damages are recovered. *Cf. Delaware, L. & W. R. Co. v. Lyne*, 193 F. 984, 985 (3 Cir. 1912). Self-evidently, it has not yet done so. See note 9, *supra*.

It has not restricted by statute the *amount* of attorney's fees or other costs recoverable, but has left that determination to the discretion of federal trial courts, subject to a standard of reasonableness. That circumstance is, and should be, determinative of the issue presented here.

Section 1988 attorney's fees should not be denied on some theory that the award of only nominal damages implies the litigation was frivolous or ill-conceived, or implicates interests too tenuous or insignificant to justify the award of costs the law otherwise would allow. Judge Cardozo long ago answered that argument:

> It is no concern of ours that the controversy at the root of this lawsuit may seem to be trivial. That fact supplies us, indeed, the greater reason why the jury should not have been misled into the belief that justice might therefore be denied to the suitor. To enforce one's rights when they are violated is never a legal wrong, and may be a moral duty. It happens in many instances that the violation passes with no effort to redress it — sometimes from praiseworthy forbearance, sometimes from weakness, sometimes from mere inertia. But the law, which creates a right, can certainly not concede that an insistence upon its enforcement is evidence of a wrong.

Morningstar v. Lafayette Hotel Co., 211 N.Y. 465, 105 N.E. 656, 657 (1914).

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and this case remanded for reconsideration of the remaining issues.

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No. 91-990

In The

Supreme Court of the United States

October Term, 1991

DALE FARRAR and PAT SMITH, as Co-Administrators of the Estate of Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

When the sole object of a suit is to recover money damages, is a plaintiff the "prevailing party" within the meaning of 42 U.S.C. § 1988 and this Court's decision in *Garland** when the jury determines that the plaintiff was not injured by the defendant and is entitled to no damages, when the court's judgment neither requires nor produces any change in state policy or practices, and when the sole "relief" awarded plaintiff is an appellate court's holding that plaintiff should recover nominal damages not exceeding $1.00?

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* *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989).

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The district judge in this case, who was not the presiding judge at trial, awarded plaintiffs' counsel every penny of the $280,000.00 fees which they claimed, as well as $27,932.00 in costs and $9,730.00 in prejudgment interest. This award was premised on his holding that plaintiffs were "prevailing parties" within the meaning of 42 U.S.C. § 1988, even though they received neither compensatory damages nor declaratory or injunctive relief. Moreover, the district judge did not conclude that plaintiffs' "victory" would be a catalyst for changes in state policy

or practices. Instead, the district judge justified his conclusion that plaintiffs had "prevail[ed]" by noting the Court of Appeals' holding in an earlier phase of this case that plaintiffs were entitled to nominal damages not to exceed $1.00 and by asserting that plaintiffs had "vindicated" their reputations as a result of the litigation. The issue before this Court is whether the Court of Appeals properly reversed the district judge's construction and application of § 1988.

The complaint. In 1975, Joseph Davis Farrar brought this civil rights action for money damages and injunctive relief under 42 U.S.C. §§ 1983 and 1985. Named as defendants were respondent, William P. Hobby Jr., then Lieutenant Governor of Texas, two elected officials of Liberty County, Texas, and three state employees. Farrar charged the defendants with having engaged in various conspiracies to deprive him of his ownership and operation of Artesia Hall, a private reform school for minors with drug-related, academic, and disciplinary problems.[1] Later amendments added Dale Lawson Farrar, Joseph Farrar's son and an employee at Artesia Hall, as a plaintiff, dropped the demand for injunctive relief, and requested as sole relief $17 million in monetary damages.

[1] In 1979, the district court granted the defendants' motions for summary judgment. A panel of the Fifth Circuit in 1981 vacated the summary judgment and remanded the case for written findings of fact and conclusions of law, directing the district court to reconsider its ruling in light of recent cases regarding the doctrine of sovereign immunity. *Farrar v. Cain*, 642 F.2d 86 (5th Cir. 1981) (per curiam) (*Farrar I*). On remand, the district court denied the motions for summary judgment.

(J.A., p. 21).[2] Joseph Farrar died in 1983, before trial. Petitioners, the co-administrators of his estate, were substituted as plaintiffs. (J.A., p. 21).

The proof at trial. Because of the fee-awarding trial court's observations in its order regarding the "significant vindication of the Farrars" (Pet. App., p. 26), it is appropriate to discuss the uncontradicted testimony regarding the Farrars' operation of Artesia Hall, which proved a pattern of sexual abuse and gruesome conditions at the school. Many witnesses testified in graphic, largely uncontroverted detail about the conditions that prompted the actions of the defendants. Media interest and coverage was intense and began before Hobby had any involvement in the matter. (See Pltf. Ex. 102A, a collection of all or most of the extensive newspaper publicity, introduced in evidence by the Farrars).

A fifteen-year-old male student at Artesia Hall testified that he had been routinely sexually abused by Farrar. The boy was moved from his dormitory into the trailer that Farrar used as a residence and told that he would be Farrar's "assistant." The boy testified that these sexual assaults by Farrar continued for a long period. He also related Farrar's statements that he had engaged in such conduct with other male students. (S.F., pp. 3458-61).

[2] References to the Joint Appendix are abbreviated "J.A." The Appendix to the Petition for Writ of Certiorari is referred to as "Pet. App." and the Appendix to Respondent's Brief in Opposition as "Br. Opp. App." References to the trial testimony are identified by "S.F." (Statement of Facts) and the appropriate page number. All emphasis in quotations has been added, unless otherwise stated.

A teacher at Artesia Hall described an incident that resulted in the death of a student, and ultimately led to Farrar's indictment for murder. The child had ingested poison, but Farrar insisted that she was "faking." He instructed others to walk the girl around the school courtyard. She began experiencing convulsions the next day, but Farrar still insisted that the girl was merely "faking." He suggested that her temperature be taken rectally, without lubrication; and Farrar himself shook the dying girl and applied the juice of hot peppers to her lips in order to elicit a "reaction." Eventually the girl was taken to a hospital, where she died. (S.F., pp. 2961-62, 3233-44).

Other witnesses described the cruel and bizarre "discipline" administered to the children at Artesia Hall: routine forms of "punishment" included confinement in an outdoor "cage," handcuffing, severe shaking, hairpulling, and haircutting. In one incident, girls were punished by not being allowed to bathe and by being denied the use of commodes. Other students were beaten. (S.F., pp. 768, 784, 867-68, 2344, 2445-48, 2853, 2877, 2939, 2945, 3107, 3110-14, 3178, 3215, 3221-22, 3448-49).

In 1973, after the death of the Artesia Hall student, the Liberty County grand jury indicted Joseph Farrar for murder. The indictment charged that Farrar had willfully failed to administer medical treatment to the dying student and had failed timely to provide for her hospitalization. (S.F., pp. 484-85). One week later, the Texas Attorney General obtained a state district court order closing Artesia Hall. The order was based upon the state's belief that there existed a clear and present danger of physical and mental intimidation of the students at Artesia Hall and that, because of the events surrounding the indictment of

Joseph Farrar, Artesia Hall could not be safely administered by its staff. (S.F., pp. 555-56).

Hobby's role in the state's closing of Artesia Hall remains unclear. Joseph Farrar himself testified by deposition that Hobby had nothing to do with the murder indictment. (S.F., p. 3766). Indeed, Hobby had never heard of the Farrars or Artesia Hall until Joseph Farrar's indictment was reported by the media. Hobby first learned the details of the conditions at Artesia Hall from a member of the state legislature, who told Hobby that students there were being abused. (S.F., pp. 1435-38, 1444-45, 1521). A member of the grand jury that indicted Farrar urged the State through Hobby to take action to protect children confined under the Farrars' "care." (S.F., pp. 1487-88).

Shortly after the indictment, Hobby issued a press release criticizing the Texas Department of Public Welfare ("DPW") and its licensing procedures for child care facilities. (S.F., p. 1442). In addition, Hobby urged the director of the DPW to investigate the situation at Artesia Hall. He also requested that the DPW confer with the Texas Attorney General's office regarding the possible revocation of the school's charter. (S.F., pp. 1449-69).

In the meantime, news of the conditions at Artesia Hall had also reached the Governor of Texas, Dolph Briscoe. After meeting with state officials, including Hobby, Briscoe decided to inspect the facility personally. He did so, accompanied by Hobby and others. After touring the school, Briscoe met with officials of the Texas Attorney General's office and requested that they take whatever legal steps were necessary to protect the children. (S.F.,

pp. 3729-35). Later that evening, a state district judge in Liberty County granted the state's application for a temporary restraining order. Although Hobby attended the hearing on the state's application, he exercised no control over the Attorney General and said nothing during the proceedings; he merely observed. (S.F., pp. 1373, 1380-81, 1501-1505).

The jury's verdict. The case was submitted to the jury on ten special interrogatories. (Br. Opp. App., pp. 1-4). The jury found, among other things, that all of the defendants *except* Hobby had engaged in a conspiracy against one or more of the plaintiffs; that this conspiracy was *not* the proximate cause of any damages to the Farrars; that Hobby "committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas"; but that the act or acts of Hobby were *not* a proximate cause of any damages to Joseph Farrar. Dale Farrar obtained no favorable findings. Based upon these answers, the court ordered "that Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs." (Br. Opp. App., pp. 5-6).

Farrar II. A panel of the Fifth Circuit affirmed the judgment in part but held that the district court had erred in failing to award Joseph Farrar nominal damages not to exceed $1.00, based upon the jury's finding of Hobby's unspecified violation of his constitutional rights. *Farrar v. Cain,* 756 F.2d 1148 (5th Cir. 1985) (*Farrar II*). The Fifth Circuit's mandate remanded the case to the district court for further proceedings consistent with its opinion but did not itself award nominal damages. (Mandate of

5/24/85, Dkt. Entry 239). Moreover, judgment for nominal damages not to exceed $1.00 was never sought and none has ever been entered. The Farrars' right to such a judgment has thus been waived. Fed. R. Civ. P. 59, 60.

The attorneys' fee award. The Farrars' lawyers did, however, seek attorneys' fees and expenses under 42 U.S.C. § 1988; and a newly-appointed district judge,[3] after a hearing, granted the full amount of the Farrars' request, awarding a total of $317,662 in attorneys' fees and expenses, plus interest, against Hobby and nothing against the other defendants. (Pet. App., p. 12).

In rendering this award, the district court conceded that it was unclear precisely what constitutional violations the jury had found as to Hobby, noting that "the jury's instructions made it difficult to discern exactly what the jury found." (Pet. App., p. 15). As a result, the court concluded that "abrupt policy changes are not likely to follow as a result of this order," (*id.* at 24), and that "plaintiffs can trace no revolution in public administration by reason of this case." (*Id.* at 28). Moreover, the district court treated as "neutral" the fact that Joseph Farrar was entitled to receive only $1.00 on a $17 million claim because the liability determination, standing alone, was a "significant vindication" of the Farrars. (*Id.* at 26). The trial court did not explain how this conclusion could

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[3] Judge Lynn Hughes, the judge who awarded the fees, was not the trial judge. After the entry of the initial judgment, Judge Robert O'Conor resigned and was succeeded after *Farrar II* by Judge Hughes, whose fee award is the basis of the present controversy.

be squared with the jury's finding that factors other than the violations found by the jury had caused the closure of the Farrars' school.

***Farrar III* – the decision below.** The Fifth Circuit reversed the award. Applying this Court's decisions in *Texas State Teachers Ass'n v. Garland Independent School District,*[4] *Rhodes v. Stewart,*[5] and *Hewitt v. Helms,*[6] the court concluded that the Farrars were not "prevailing parties" within the meaning of 42 U.S.C. § 1988:

> The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal victories are made." Of course, as the district court emphasized, the Farrars did succeed in securing a jury-finding that Hobby violated their civil rights[7] and a nominal award of one dollar. However, this finding did not in any meaningful sense "change the legal relationship" between the Farrars and Hobby. Nor was the result a success for the Farrars on a "significant issue that achieve[d] some of the benefit the [Farrars] sought in bringing suit." When the sole relief sought is money damages, we fail to see how a party "prevails" by winning one dollar out of the $17 million requested. Furthermore, even if the Farrars could be seen as victors, given their singular objective of money damages, surely theirs was "a technical victory . . . so insignificant, and . . . so near the situations addressed in *Hewitt* and *Rhodes,* as to be insufficient to support prevailing party status."

Estate of Farrar v. Cain, 941 F.2d 1311, 1315 (5th Cir. 1991) (*Farrar III*) (Pet. App., pp. 38-39) (footnotes omitted) (alterations in original). Like the district court, the Court of Appeals recognized that plaintiffs had neither sought nor achieved any change in Texas policies or practices:

> This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more.

941 F.2d at 1315 (Pet. App., p. 40).

The dissenting judge below had "difficulty understanding the justification for the finding that [Lieutenant] Governor Hobby violated plaintiffs' civil rights," 941 F.2d at 1317 (Reavley, J., dissenting) (Pet. App., p. 45), further emphasizing that the judgment had established no constitutional principles (or other guides to conduct) that could serve as a basis for revision of state policies or practices by Lt. Governor Hobby or future Lieutenant Governors. Moreover, the dissenting judge, unlike the majority, addressed Hobby's alternative argument that the trial court abused its discretion in setting the amount of the fee award, and would have remanded the case for a redetermination of that award. *Id.*

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[4] 489 U.S. 782 (1989).

[5] 488 U.S. 1 (1988) (per curiam).

[6] 482 U.S. 755 (1987).

[7] In fact, only Joseph Farrar obtained a favorable jury finding; Dale Farrar got none. (Br. Opp. App., p. 3; S.F., p. 565).

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit's decision is correct. The Farrars are not "prevailing parties" because the Farrars obtained none of the relief sought and failed either to alter materially the legal relationship between them and Hobby or to elicit any changes in Texas policy or practices. They sought but one thing in their lawsuit: huge compensatory damages. The jury gave them nothing. The holding of the appellate court in *Farrar II* that Joseph Farrar was entitled to nominal damages (which has never matured to judgment and has never been collected by the Farrars) did not materially alter the legal relationship between the Farrars and Hobby. The "award" of nominal damages (even if it had been reduced to a judgment) is the kind of insignificant, technical "success" that, as this Court observed in *Garland*, cannot support an award of attorneys' fees.

2. Congress never intended that a right to an award of nominal damages (in a case in which the plaintiff seeks compensatory damages only and achieves no change in governmental or institutional conduct) would support an award of attorneys' fees. The Fifth Circuit's decision is entirely consistent with the purpose of the statute, which is to allow fee recovery only by those who truly "prevail" in some tangible way and to deny fees where such an award would be unjust.

3. It is settled law that nominal damages do not justify the imposition of costs or attorneys' fees. Congressional intent must be ascertained in the light of this history and the purpose of § 1988 to encourage meritorious litigation only.

4. The district court clearly abused its discretion in setting the amount of the fee award. Although the Court of Appeals did not base its decision on this ground, Hobby has preserved the question for this Court's review by raising it in both courts below. The district court's error in determining the size of the fee award is plain and must be corrected even if the Farrars' position in this Court were accepted.

ARGUMENT

I. The right to an award of nominal damages to Joseph Farrar's estate did not materially alter the legal relationship between the Farrars and Hobby. It was, at most, a "technical or *de minimis*" success.

The fee-awarding trial judge refused this Court's guidance by failing to apply the clear standard enunciated in *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989). There, the Court unanimously held: "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)) (alteration in original). Like the district court, the Farrars here contend that they are "prevailing parties" by focusing exclusively upon the liability determination made by the jury regarding Hobby's unexplained violation of their constitutional rights and ignore the remedial phase of the case. However, this Court's decision in *Garland*, as well as its earlier

opinions in *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988), make clear that in order to prevail a plaintiff must obtain "some *relief* on the merits," *Garland*, 489 U.S. at 790 (citing *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980)). *See also Garland*, 489 U.S. at 791 (plaintiff must obtain "some of the *relief* sought.").[8]

Thus, under *Garland*, the dispositive test is whether the relief granted has brought about "changes [in the] legal relationship between [the plaintiff] and the defendant." 489 U.S. at 792. And as *Hewitt*, 482 U.S. at 761, makes clear, such a change in a legal relationship requires more than a liability determination:

> At the end of the rainbow lies not a judgment, but some action by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant.

(emphasis in original). *See also Rhodes*, 488 U.S. at 4 ("In the absence of relief, a party cannot meet the threshold requirement of § 1988 . . . .").

Garland also makes clear that the relief won by plaintiff must bring about a change in the legal relationship that is "material," not merely "technical":

> The touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

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[8] The ABA completely misunderstands *Garland*, *Hewitt* and *Rhodes* in contending (ABA Amicus Br., pp. 13-14) that success on the liability phase of the case entitles plaintiffs' counsel to their fees.

489 U.S. at 792-93. For that reason, no attorneys' fees are to be awarded if the victory in the litigation is merely "technical." Such "purely technical or *de minimis*" relief would fall short of even the " 'generous formulation we adopt today.' " *Garland*, 489 U.S. at 792 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 279 n.3 (1st Cir. 1978)).

The *Garland* test was a natural evolution from the teaching of this Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980), as well as *Hewitt* and *Rhodes*.[9]

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[9] The cases cited favorably by this Court in *Garland* (*see* 489 U.S. at 784) do not support the Farrars' position. *Gingras v. Lloyd*, 740 F.2d 210 (2d Cir. 1984), held that even in a case where the judgment was a "catalyst" for change in state policy, the trial court, in order to award attorneys' fees, must find that plaintiffs improved their own situation *as a result of the lawsuit*. Appointment of a special master who helped assure that plaintiffs' confinement was constitutionally appropriate did not create prevailing party status. *Id.* at 213. Plaintiff in *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985), succeeded in eradicating an unconstitutional seizure statute and was thus a "prevailing party" because of this real relief. Plaintiff in *Fast v. School District of Ladue*, 728 F.2d 1030 (8th Cir. 1985), received $1.00 in nominal damages *and* declaratory and injunctive relief granting her substantial rights. In addition, "the relief granted . . . was not, as a practical matter, limited to the named plaintiff." *Id.* at 1034. In *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124 (9th Cir. 1983), plaintiffs succeeded by gaining access to valuable fishing rights. The court emphasized that in order to be a "prevailing party" the plaintiff must establish " 'some sort of clear, causal relationship between the *litigation brought and the practical outcome realized.*' " *Id.* at 1125 (quoting *American Constitution Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981)). In *Nephew v. City of Aurora*, 766 F.2d 1464 (10th Cir. 1985), *cert denied*, 485 U.S. 976 (1988), the court held that it was error for a trial judge to award $12,500 in fees to attorneys whose plaintiffs recovered $100.00.

The language and judicial attitude of *Hensley* is inconsistent with the Farrars' position. The Court there said: "The *result* is what matters," 461 U.S. at 435. "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained.*" *Id.* at 436.

In *Hanrahan,* the relief that the alleged "prevailing" litigant received was more significant than Joseph Farrar's entitlement to a judgment not to exceed $1.00 in nominal damages, yet Hanrahan was not a "prevailing party." Plaintiff there obtained on appeal the very valuable right to discover the identity of an informant and thus potentially to find the key to a successful defense. 446 U.S. at 756. But this did not make the plaintiff a "prevailing party" because of the Congressional intent that a party be deemed so only in the event that there has been "a determination of the 'substantial rights of the parties' . . . . " 446 U.S. at 758.[10]

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[10] *Hanrahan,* like the Farrar's case, is an example of the outrageous waste created by meritless "conspiracy" allegations. The trial lasted eighteen months and was followed by multiple appeals despite a trial court determination that the record was " 'devoid of proof of . . . participation [by the federal defendants] in a conspiratorial plan.' " 446 U.S. at 761 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and dissenting in part) (alterations in original). Adoption of the rule advocated by the Farrars can only encourage meritless litigation – all in contravention of Congress' purpose; i.e., to create an incentive for prosecuting good cases but to discourage the pursuit of meritless ones.

Rhodes emphasizes that *Garland* requires that the judgment materially alter either the defendant's conduct as to plaintiff or the legal relationship between them. As in the Farrars' case, the allegedly aggrieved plaintiff had died by the time the court entered the order decreeing that as a prison inmate he was entitled to subscribe to certain magazines. Thus, plaintiff was not a "prevailing party" because:

> A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order.

Rhodes, 488 U.S. at 4.

The conflict in the circuits referred to in the Fifth Circuit's opinion is more apparent than real. Of the dozens of pertinent cases only three are in conflict with the Fifth Circuit's opinion.[11]

An excellent current example of a circuit court's faithfully applying the *Garland* standard is *Christopher P., ex rel. Norma P. v. Marcus,* 915 F.2d 794 (2d Cir. 1990), *cert.*

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[11] *Romberg v. Nichols,* 953 F.2d 1152 (9th Cir. 1992); *Ruggiero v. Kreminski,* 928 F.2d 558 (2d Cir. 1991) (Jury determined that plaintiff's Fourth and Fourteenth Amendment rights were violated by a search conducted by police officers and awarded nominal, not compensatory, damages); *Tedesco v. City of Stamford,* 588 A.2d 656 (Conn. App. 1991), *cert. granted in part,* 593 A.2d 137 (Conn. 1991) (Plaintiff was entitled to $1.00 for city's failure to afford him a constitutionally adequate post-termination hearing. Such award did not bar plaintiff from recovering attorneys' fees in a § 1983 action. The court did not discuss *Garland.*).

denied, 111 S. Ct. 1081 (1991). There, the plaintiff obtained a temporary restraining order that had the effect of placing him back in the school he wished to attend and also achieved a favorable statement of the law. But, on the basis of a *Garland* analysis, the same plaintiff was held not to be a "prevailing party." Many other cases correctly apply *Garland*.[12] The few wrongly decided cases illustrate

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[12] *See Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991) (Jury award for Fourth Amendment violation was technical and *de minimis* where plaintiff sought $300,000 and received jury verdict for $1,000. Court suggested that plaintiff's counsel acted improperly in even claiming substantial attorneys' fee where recovery fell so far short of that requested.); *Langton v. Johnston*, 928 F.2d 1206, 1226 (1st Cir. 1991) (Prison case in which plaintiffs failed on most issues, but achieved arguable success on issue of "double bunking"; but if issue of "double bunking" was of only "minor significance," or did not have a "catalytic effect" in bringing about abandonment of the practice, no fees may be awarded.); *Denny v. Hinton*, 131 F.R.D. 659 (M.D.N.C. 1990), *aff'd mem., Denny v. Elliot*, 937 F.2d 602 (4th Cir. 1992) and *Lawrence v. Hinton*, 937 F.2d 603 (4th Cir. 1991) (Jury verdict in favor of plaintiff for $1.00 was *de minimis*, since judgment obviously had no effect on relationship between plaintiff and defendant.); *Northbrook Excess & Surplus Ins. v. Proctor & Gamble*, 924 F.2d 633, 641-42 n.11 (7th Cir. 1991) (Court held that recovery of $45,000 in light of claim of more than $5 million was *de minimis*; thus, party did not prevail.); *Warren v. Fanning*, 950 F.2d 1370 (8th Cir. 1991), *petition for cert. filed* (Mar. 27, 1992) (No. 91-8221) (Jury verdict finding that plaintiff's Eighth Amendment rights were violated was a "pyrrhic victory" where no damages were awarded and thus *de minimis* under *Garland*. Plaintiff was not prevailing party.); *Slade ex rel. Estate of Slade v. United States Postal Service*, 952 F.2d 357 (10th Cir. 1991) (Plaintiff was not prevailing party even though he obtained right to be evaluated on non-discriminatory criteria.); *Walker v. Anderson Electrical Connectors*, 944 F.2d

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the bizarre results that flow from the "standard" advocated on behalf of Joseph Farrar.

In *Romberg v. Nichols*, 953 F.2d 1152 (9th Cir. 1992), two policemen risked their lives to rush into the Rombergs' apartment because they justifiably believed their action was necessary to save Mrs. Romberg from serious harm. Mr. Romberg appeared to be threatening to inflict death or serious harm, and the Rombergs were subsequently convicted of disturbing the peace. Even the trial court found that the police entered because they honestly feared for Mrs. Romberg's safety; but because the entry was without a search warrant it was held to be a deprivation of constitutional rights. The Rombergs were awarded $1.00 in nominal damages *and* $29,137.50 in attorneys' fees against the officers who had risked their lives to save Mrs. Romberg from Mr. Romberg's violent behavior.

Romberg is distinguishable from this case because the Rombergs' counsel at trial actually argued for nominal damages when he sensed that the jury might rule against

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841, 846-47 (11th Cir. 1991), *petition for cert. filed* (May 8, 1992) (No. 91-1794) (Mere fact that jury found defendant committed acts of sexual harassment and thus violated statute did not entitle plaintiff to attorneys' fees under *Garland*, *Hewitt* and *Rhodes*.); *Carr v. City of Florence*, 729 F. Supp. 783, 791 (N.D. Ala. 1990), *aff'd*, 934 F.2d 1264 (11th Cir. 1991) (Attorneys' fees denied even though jury found that when citizen was slapped by police officers his rights were violated and awarded plaintiff $100.00 in compensatory damages, judgment was still "purely technical" and *de minimis*.).

his clients on liability if they sought compensatory damages. However, *Romberg* illustrates the type of result that would be encouraged by the Farrars' approach were it adopted by this Court, and it shows that the rule advocated by Farrars' counsel can create a conflict between the interests of the attorney and the client.

A. An award of nominal damages that does not cause a change in policy or practice is "purely technical or *de minimis*."

The examples of "purely technical or de minimis" success precluding an attorneys' fee award to which the Court's opinion in *Garland* refers all involved situations in which the success was "de minimis." But in each the relief obtained was more substantial than that achieved by Joseph Farrar's estate:

1. The right to "talk union" or hold union meetings on school grounds after regular school hours without the consent of the school's principal. *Garland*, 489 U.S. at 786-87.

2. A holding that one "minor" regulation of the Human Resources Administration was unconstitutional. *Id.* at 792 (citing *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718 (2d Cir. 1984)).

3. Plaintiff who had recovered $16,000 was entitled to attorneys' fees only if the trial court determined that "the basic objectives plaintiffs seek from the lawsuit have been achieved or furthered in a significant way" and holding that "[n]uisance settlements, of course, should not give rise to a 'prevailing'

plaintiff." *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980), cited in *Garland*, 489 U.S. at 792.

An award of "nominal damages" is, by definition, precisely the kind of "technical or *de minimis* victory" that this Court described in *Garland* – a "success" that does not trigger a fee award under § 1988. Nominal damages are not minuscule compensatory damages; instead, they are totally different in kind, character and amount from compensatory damages. Courts throughout history have consistently recognized that nominal damages are symbolic, a recognition of a mere technical invasion of rights. *E.g., Chesapeake & Potomac Tel. Co. v. Clay*, 194 F.2d 888, 890 (D.C. Cir. 1952) ("[N]ominal damages means a trivial sum – usually one cent or one dollar – awarded to a plaintiff whose legal right has been technically violated but who has proved no real damage.").[13] Commentators

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[13] *See also Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 714 (Del. Super. Ct. 1967) ("Nominal damages are damages in name only, not damages in fact."); *Ballenger Paving Co. v. North Carolina State Highway Comm'n*, 129 S.E.2d 245, 248 (N.C. 1963) (Nominal damages are " 'a small trivial sum awarded in recognition of a technical injury which has caused no substantial damage.' ") (quoting *Hairston v. Atlantic Greyhound Corp.*, 18 S.E.2d 166 (N.C. 1942)); *Womack v. Ward*, 186 S.W.2d 619, 620 (Tenn. Ct. App. 1944) ("Nominal damages are given, not as an equivalent for the wrong, but in recognition of a technical injury . . . . "); *Price v. McComish*, 70 P.2d 978, 982 (Cal. Dist. Ct. App. 1937) ("Nominal damages are so called in contradistinction to actual, substantial, or compensatory damages."); *Flournoy v. Story*, 37 S.W.2d 272, 273 (Tex. Civ. App. – Ft. Worth 1930, no writ) ("Nominal damages are not actual damages, but an arbitrary amount that may be assessed by court or jury for the

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have described the function of nominal damages in similar terms. *E.g.*, Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8, at 191 (1973) (Nominal damages "do not represent 'damages' at all.").[14] Lexicographers agree that nominal damages are tantamount to no relief at all. Webster's defines "nominal" as "existing or being something in name or form but usually not in reality."[15]

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invasion of a legal right, even though no actual damage may be awarded."); *Michael v. Curtis*, 22 A. 949, 951 (Conn. 1891) ("Nominal damages mean no damages. They exist only in name, and not in amount."); *Beaumont v. Greathead*, 135 Eng. Rep. 1039, 1041 (C.P. 1846) ("Nominal damages . . . mean a sum of money that may be spoken of, but that has no existence in point of quantity . . . . ").

[14] *Accord* 1 Theodore Sedgwick et al., *A Treatise on the Measure of Damages* § 98, at 167 (9th ed. 1913) ("[N]ominal damages may be recovered for the bare infringement of a right, or for a breach of contract, unaccompanied by any actual damage."); 1 Joseph A. Joyce & Howard C. Joyce, *A Treatise on Damages* § 8, at 6 (1903) ("Nominal damages are a small and trivial sum awarded for a technical injury due to a violation or invasion of some legal right . . . . "); 1 J. G. Sutherland & John R. Berryman, *A Treatise on the Law of Damages* § 9, at 31 (4th ed. 1916) (Nominal damages are "a sum of money that can be spoken of, but has no existence in point of quantity."); Ralph S. Bauer, *Essentials of the Law of Damages* § 42, at 111 (1919) ("In any case in which there is a mere technical right of action, no more than nominal damages may be awarded."); Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935) ("Nominal damages are damages awarded in a trivial amount merely as a recognition of some breach of a duty owed by defendant to plaintiff and not as a measure of recompense for loss or detriment sustained.") (footnote omitted).

[15] *Webster's Third New International Dictionary* 1534 (Philip B. Grove ed., 1981). *Accord Black's Law Dictionary* 392 (6th ed.

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Joseph Farrar's estate's right to receive a judgment for an amount not to exceed one dollar worked at most a "technical" alteration in the legal relationship between the Farrars and Hobby. A better example of a *de minimis* or technical "victory" of the sort described in *Garland* can hardly be imagined. Indeed, the outcome was so insignificant that the Farrars and their attorneys have not bothered even to request that the district court sign a judgment for nominal damages against Hobby, let alone attempted to collect them.[16] Thus the record does not support the Farrars' characterization of the issue on which this Court granted certiorari: "Does 42 U.S.C. § 1988 authorize the award of reasonable attorneys' fees to civil rights plaintiffs who *recover* nominal damages?" (Pet. Cert., p.i). Since the Farrars have not, in fact, "recovered" nominal damages, Hobby respectfully suggests that

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1990) ("Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights. . . . "); 10 *Oxford English Dictionary* 471 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) ("Existing in name only, in distinction to real or actual; merely named, stated, or expressed, without reference to reality or fact.").

[16] After holding that the trial court erred in failing to award nominal damages, the Fifth Circuit remanded the case to the district court "for proceedings consistent with this opinion." *Farrar v. Cain*, 756 F.2d 1153 (5th Cir. 1985). (Pet. App., pp. 10-11.) Following remand, the district court has not signed a judgment against Hobby for nominal damages, nor have the Farrars requested that it do so.

the writ of certiorari should be dismissed as improvidently granted.[17]

B. The Farrars achieved none of the benefits they sought in bringing their lawsuit.

The Farrars neither sought nor obtained injunctive, declaratory, or other relief that resulted in any material alteration of their long-past and fleeting legal relationship with Hobby. Rather, the Farrars wanted just one thing; compensatory damages. They obtained none.

But instead of evaluating the Farrars' failure to obtain relief, the district court speculated on the "cumulative effect" that the lawsuit might have on the behavior of government officials. (Pet. App., p.24). The reasoning employed by the district court in this regard is circular and ignores *Garland*.

As justification for concluding that the Farrars "succeeded" in their civil rights action within the meaning of § 1988, the district court turned back to § 1988: "Awarding attorneys' fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions." (Pet. App., p.23). In other words, according to the district court, the Farrars would be the "prevailing parties" within the meaning of § 1988

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[17] *See, e.g, Phillips v. New York*, 362 U.S. 456 (1960) (dismissing writ as improvidently granted because "the totality of the circumstances as the record makes them manifest did not warrant bringing the case here").

if they were awarded fees under § 1988, thus the circle in the trial court's reasoning.

Moreover, the district court's speculation on the deterrent effect of this lawsuit as a basis for an award of attorneys' fees misses the point and is bad policy. As this Court stated in *Garland*, a plaintiff must first be "a prevailing party within the meaning of § 1988" to be entitled to attorneys' fees. 489 U.S. at 791. This inquiry depends on the plaintiffs' success in obtaining relief in the underlying lawsuit. *Id.* The Fifth Circuit correctly analyzed the Farrars' "success" under that standard: "When the sole relief sought is money damages, we fail to see how a party 'prevails' by winning one dollar out of the $17 million requested." *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5th Cir. 1991). (Pet. App., p.39).

The Farrars argue that the Fifth Circuit's holding conflicts with this Court's decision in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and they criticize the opinion below for failing to "discuss or cite" *Rivera*. (Pet. Br., p.10). The Farrars' assertion is incorrect and their criticism misplaced because the *Rivera* plaintiffs achieved some of what they sought – compensatory damages. *Rivera* presented the narrow issue "whether an award of attorney's fees under 42 U.S.C. § 1988 is *per se* 'unreasonable' within the meaning of the statute if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action." 477 U.S. at 564. *Rivera*, therefore, was concerned with the proper *amount* of a fee award, not the plaintiff's entitlement to any award at all.

The Fifth Circuit concluded in this case that the Farrars failed to cross "the threshold to a fee award of some

kind." *Estate of Farrar*, 941 F.2d at 1313 (Pet. App., p. 35) (quoting *Garland*, 489 U.S. at 792). The Fifth Circuit did *not* base its holding on the amount of the fees awarded. Rather, the Fifth Circuit reached only the question of the right to any fee *at all*:

> [W]e hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more. We must – under *Garland*, *Hewitt*, and *Rhodes* – inquire into whether the plaintiff's victory, as measured by the relief actually obtained, was merely a *de minimis* or technical success.

941 F.2d at 1315-16 (footnote omitted).

Thus, as *Garland* required it to do, the Fifth Circuit examined whether the Farrars succeeded on "any significant issue in litigation" and whether that success "achieved some of the benefit" they sought in bringing their lawsuit. The Fifth Circuit did *not* justify its holding on the basis that the fee award ($317,662) was disproportionate to the amount of nominal damages (an amount not to exceed $1.00).

Nor can the Farrars legitimately claim, as the district court concluded, that the jury's one finding in their favor has, like a declaratory judgment, somehow "vindicated" their rights. This Court in *Hewitt v. Helms* expressly rejected that theory. There, too, the argument was advanced that a plaintiff had been "vindicated" by a judicial holding that his rights had been violated. Rejecting the very type of argument that ultimately succeeded

in the trial court here, this Court held that the mere "moral satisfaction of knowing that a federal court concluded that [plaintiff's] rights had been violated," 482 U.S. at 762, could not be the basis for a prevailing party determination under § 1988.[18]

Hewitt bears a strong resemblance to this case. In *Hewitt*, a state prisoner (Helms) sought compensatory damages and injunctive relief based on a claim that procedural due process had been denied him; but his release mooted the latter claim; and no judgment was ever entered granting him any relief. Helms enjoyed a declaration that his right to procedural due process had been denied. Here, Dale Farrar received nothing; and Joseph Farrar died before the case came to trial, so that a judgment regarding his procedural due process rights cannot avail him. And his estate recovered nothing – not even the nominal damages not to exceed $1.00 that the Fifth Circuit concluded would be appropriate. As this Court noted in *Hewitt*, "Respect for ordinary language requires that a plaintiff *receive* at least *some* relief on the merits of

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[18] In *Roth v. Pritikin*, 878 F.2d 54 (2d Cir. 1988), a litigant enjoyed the fact that the trial court expressed in writing an acceptance of his, rather than his adversary's, credibility – but this "vindication" did not make him a prevailing party. Similarly, if the Farrars' position here were accepted, a plaintiff who had received no judicial relief might successfully argue that he had achieved "prevailing party" status because of a favorable testimonial admission from his adversary even though that admission did not result in a favorable judgment.

his claim before he can be said to prevail." 482 U.S. at 760.[19]

By contrast, the dictum from *Carey v. Piphus*, 435 U.S. 247 (1978), does not advance the Farrars' position. In *Carey*, students sued two public schools and their officials under 42 U.S.C. § 1983, alleging that the students had been suspended without procedural due process. *Id.* at 248.[20] The plaintiffs sought declaratory and equitable relief, as well as actual and punitive damages. *Id.* at 250. This Court "granted certiorari to consider whether, in an action under § 1983 for deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages." *Id.* at 253. On this specific issue, it held "that in the absence of proof of actual injury, the students are entitled to recover only nominal damages." *Id.* at 248. In a footnote, the Court added the following: "We also note that the potential liability of

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[19] In an additional parallel to the plaintiff in *Hewitt*, the one "favorable" judicial pronouncement that Joseph Farrar obtained – the jury verdict and the Fifth Circuit's opinion directing the entry of nominal damages – has never been translated into an actual judgment. *See Hewitt*, 482 U.S. at 760 ("[T]he fact is that Helms' counsel never took the steps necessary to have a declaratory judgment or expungement order properly entered. Consequently, Helms received no judicial relief.").

[20] *Carey* supports Hobby's position because its essential holding is that, while civil rights litigation is extremely important, it still must be regarded as part of the real world – a civil rights plaintiff must prove and persuade the fact finder that he has suffered real damage to be entitled to a damages award.

§ 1983 defendants for attorney's fees . . . provides additional – and by no means inconsequential – assurance that agents of the State will not deliberately ignore due process rights." *Id.* at 257 n.11 (citations omitted).

The footnote reference to "potential liability" of a defendant under § 1988 does not analyze the circumstances under which such liability may arise. Nonetheless, the Farrars cite this language as support for their position.

The plaintiffs in *Carey*, however, had exposed a clear violation of due process in connection with the procedure by which children were suspended from public schools – a constantly recurring situation. Furthermore, the plaintiffs in *Carey*, unlike the Farrars, won injunctive and declaratory relief. 435 U.S. at 252. Thus, had the plaintiffs been awarded their attorneys' fees, the award would undoubtedly have been based upon their having established an important legal principle that could be seen as a "catalyst" for change in the schools' administration.[21]

The Farrars' lawsuit had no "catalyst" ramifications. It remains to this day unknown and unknowable what constitutional violation Hobby committed. Not one change was brought about or was foreseeably likely to have been brought about as a result of this lawsuit. The Farrars can point to no alteration of state policy, no adoption of any new policy, nor any change in conduct by

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[21] *But see Hewitt*, 482 U.S. at 763-64 (rejecting "catalyst" theory as a basis for awarding attorneys' fees where the plaintiff *himself* would not benefit from the change that his lawsuit prompted).

the defendants.[22] Even the district court conceded that "abrupt policy changes are not likely to follow as a result of" its order (Pet. App., p.24) and that the Farrars "can trace no revolution in public administration by reason of this case . . . . " (Pet. App., p.28). Nor can the jury verdict serve as a guide to other state officials since, as the trial court also conceded, "The jury instructions made it difficult to discern exactly what the jury found . . . ." (Pet. App., p.15) and, as to Hobby, it is impossible. In other words, the Farrars' lawsuit sought to change nothing except the Farrars' net worth. But it failed. *Carey*, therefore, is inapposite.

The concluding words of the Court in *Garland* show that plaintiffs do not qualify as prevailing parties here. In *Garland*, the plaintiffs' "success [had] materially altered the school district's policy . . . . Petitioners have thus served the "private attorney general" role which Congress meant to promote in enacting § 1988." 489 U.S. at 793.

Here, by contrast, all three judges of the Court of Appeals and even the judge who awarded the fees recognized that the Farrars' "victory" in the liability stage of

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[22] Indeed, in their Third Amended Complaint (Pet. App., pp.23-24) filed at the close of the evidence apparently to conform the pleadings to the proof at trial, the Farrars did not even *allege* Hobby's participation in some state practice or policy that infringed their constitutional rights. Rather, the allegations regarding Hobby were that he "met with" other state officials on June 20, 1973 to demand "the closing of Artesia Hall," and that he, Governor Briscoe, and other officials made a "highly publicized" inspection of Artesia Hall on June 22, 1973. (Pet. App., pp.30-31).

this case will lead to no policy changes by the State of Texas or its officials. Thus, the Farrars' argument that attorneys' fees should be awarded to "deter similar violations" (Pet. Br., p.6), or where the case establishes a "benchmark" for official behavior (*id.*), or "important legal or constitutional principles" (*id.* at 5), does not sustain their award here. As the Court of Appeals held, this was a case about money, not constitutional principles. Failing entirely on their money-damage claim, and instead being "awarded" a nominal $1.00, the Farrars have achieved none of the results they sought.[23]

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[23] The Fifth Circuit's opinion is not the restrictive, all-encompassing rule that the Farrars and the ABA have suggested. Under the circumstances here – money damages were the *sole* relief that the Farrars sought – the court concluded that the right to an award of nominal damages did not support the characterization of the Farrars as the "prevailing" parties. But the Fifth Circuit's opinion does not foreclose the possibility that an award of nominal damages – or *no* damages – might support an award under § 1988. If nominal damages are coupled with or bring about some change in state policy or some alteration of a defendant's conduct (i.e., a tangible, material alteration in the parties' legal relationship), or if an injunction or declaratory relief requires such a change or alteration, a fee award may be justified.

II. Congress did not intend that a plaintiff who recovers only nominal damages, which are not a catalyst producing changes in policy or practice, should be entitled to attorneys' fees under § 1988.

In examining the purposes behind the enactment of section 1988, this Court has observed that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 94-1011, 94th Cong. 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912). The award in this case fails on both counts:

(1) the Farrars were *not* the prevailing parties; and

(2) the circumstances of this case make the award of attorneys' fees unjust.

After being subjected to a grueling trial of six weeks, Hobby and his counsel could hardly have been more pleased with the verdict. The jury exonerated Hobby of any involvement in a "conspiracy" against the Farrars. (Br. Opp. App., p.2). Although it found that Hobby committed some undefined act that deprived Joseph Farrar of a civil right, the jury also found this act was *not* a proximate cause of any damages to Joseph Farrar. (Br. Opp. App., p.3). Moreover, the judgment of the court which tried the case expressly provided that "plaintiffs take nothing, that the action be dismissed on the merits, and that *the parties bear their own costs.*" (Br. Opp. App., p.6). In a lawsuit in which the stakes were $17 million, what defendant would not be overjoyed by such an outcome?

The fee-awarding district judge (not the judge who heard six weeks of testimony), speculated in his memorandum opinion that: "It is perhaps because of [Joseph] Farrar's untimely death that large actual monetary damages were not proved and a take nothing judgment was entered." (Pet. App., p.15).[24] In other words, "the court may have attempted to make up to [plaintiffs] in attorney's fees what it felt the jury had wrongfully withheld from them in damages. . . . But a district court, in awarding attorney's fees under § 1988, does not sit to retry questions submitted to and decided by the jury." *City of Riverside v. Rivera*, 477 U.S. 561, 591 (1986) (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, J.J., dissenting).

Fifteen years after an apparent victory, Hobby got a rude awakening indeed: despite the fact that he defeated this lawsuit – walking away with a defendants' verdict of zero damages – he must pay over $300,000 in fees and expenses. In addition to suffering through the expense and harassment of defending (and prevailing) in this litigation, Hobby is slapped with an even greater injustice: he is ordered to pay his opponents' attorneys' fees and their costs. Awarding the Farrars their attorneys' fees and expenses, under the circumstances, would work the very kind of injustice Congress warned against when it enacted § 1988. *See Hensley*, 461 U.S. at 429. That the State's Lieutenant Governor, responding to the horrors of Artesia Hall, should be mulcted in damages or attorneys'

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[24] Actually, a lengthy deposition had been taken of Joseph Farrar; and the jury heard his side of the dispute through that testimony in intricate detail.

fees by reason of some unspecified procedural default on his part, committed in the process of calling them to a halt, does not resonate harmoniously with the purposes of § 1988 – rather the contrary.[25]

The Farrars' argument based on legislative history is largely answered by the above analysis of *Carey*: the importance of "vindicat[ing] important civil and constitutional rights that cannot be valued solely in monetary terms," or "secur[ing] important societal benefits," (Pet. Br., pp. 21-22; ABA Br., pp. 5-6) simply is inapposite in a case like this one, which involved no constitutional principle, but was instead only an attempt by the Farrars to secure an enormous damage award based upon alleged harm to their business.

The three recent Senate bills referred to by the Farrars (Pet. Br., p.22 n.9), are substantially identical. As S.133 102d Cong. 1st Sess., introduced in 1991, reveals, they provided, in pertinent part, that in awarding fees to plaintiffs who successfully sue the United States, a state, or a locality, "[t]he court . . . may reduce or deny the amount of attorneys' fees and related expenses otherwise allowable, based on a finding that . . . the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or injunctive relief achieved in the proceeding." This is not a "prevailing party" standard, but instead is an aid to courts in fixing the amount of fees and costs to be awarded.

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[25] The same statement can be made of each of the wrongly decided cases which adopt the approach of the fee-awarding trial judge in this case.

The pre-1976 cases relied upon by the Farrars (Pet. Br., pp.22-24), by no means support their reading of § 1988. For example, *Hammond v. Housing Authority*, 328 F. Supp. 586, 588 (D. Ore. 1971), a case characterized by the Farrars as "particiularly significant" (Pet. Br., p.23 n.10), typifies the sort of case in which an award of nominal damages can properly support attorneys' fees: the liability phase of the case uncovered a clear record of impermissible, class-based discrimination, violative of the Fourteenth Amendment, which led to a rectification of the defendants' practices in a fashion that benefitted the plaintiffs and others similarly situated. Plaintiffs were awarded nominal damages and attorneys' fees of $1,000.

Section 1988 was passed in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), where this Court limited the application of the "private attorney general" concept being applied by some lower courts.[26] The Farrars argue that under the "private attorney general" concept as it existed before *Alyeska*, attorneys' fees were routinely awarded in cases where plaintiffs received only nominal damages; but examination of those authorities reveals that before the enactment of § 1988 (as, of course, after) nominal damages alone, without injunctive, declaratory relief, or catalytic change did not support attorneys' fee awards.[27] Diligent search has revealed no pre-*Alyeska*

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[26] *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

[27] *Skehan v. Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975), does not support the Farrars'

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case in which attorneys' fees were awarded under a private attorney general theory where a plaintiff had achieved no injunctive, declaratory or class relief and the court's judgment neither required nor produced a change in state policy.

Finally, the Farrars' suggestion that Congress in its 1976 enactment of § 1988 intended the same standard for attorneys' fees that is used under the antitrust laws (Pet. Br., pp. 24-25) is refuted by the very antitrust case which they cite. *United States Football League v. National Football League*, 887 F.2d 408, 412 (2d. Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), upon which petitioners heavily rely (Pet. Br., pp. 24-25), specifically recognized that Congress had mandated the award of attorneys' fees under antitrust laws, while adopting a higher "prevailing party" standard under § 1988.

III. Attorneys' fees are not "costs" under § 1988.

The Farrars' concluding argument, that historically plaintiffs recovering nominal damages could be awarded

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position but merely states that if back pay is awarded attorneys' fees might be appropriate under a private attorney general theory. *See* 501 F.2d at 45. In *Brito v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973), plaintiff won an injunction in addition to nominal damages. Plaintiff in *Thonen v. Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974), *aff'd on other grounds*, 517 F.2d 3 (4th Cir. 1975), received small but real compensatory damages of $200. Plaintiff in *Berry v. Macon County Board of Education*, 380 F. Supp. 1244 (M.D. Ala. 1971), achieved reinstatement in addition to nominal damages.

costs and attorneys' fees as "an item of costs," when properly understood,[28] supports the decision of the Fifth Circuit majority. In America, attorneys' fees have never been viewed as simply one more component of traditional costs such as, for example, filing fees; nor, in modern times, have awards of nominal damages usually carried with them an automatic award of costs. Indeed, in its last statutory expression directly in point, Congress provided that plaintiffs recovering less than $500 in most damages actions filed in federal court were not to be allowed costs but were themselves subject to a cost assessment. 28 U.S.C. § 815 (repealed).[29]

The Farrars seem to assert that when in 1976 Congress chose to speak in terms of "costs" and "prevailing parties," it necessarily meant to include those who recovered only nominal damages, since historically it was so uniformly established that nominal damages were "a peg

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[28] The original trial court judgment held that each party should bear his own costs. (Br. Opp. App., pp. 5-6). The Farrars' counsel never perfected an appeal from this part of the original trial court judgment.

[29] This provision was enacted by the First Congress, Act of Sept. 24, 1789, ch. 20, sec. 20, Stat. 83, and remained in the law until 1948, long after the adoption of the Federal Rules of Civil Procedure in 1937. The full text of the statute, at the time of its repeal, stated: "[W]hen, in a district court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of $500, exclusive of costs, in a case which can not be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libellant, upon his own appeal, recovers less than the sum or value of $300, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs."

on which to hang costs" that Congress must have had that result in mind when selecting the quoted language. The fact is, however, that the "peg for costs" view, while anciently prevalent, began losing ground about 1670 and had long faded from currency by the time Congress enacted § 1988, so that it could scarcely have represented what Congress had in mind in 1976. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 24 at p. 93 (1935). The dates of the Farrars' authorities cited for this point (Pet. Br., pp. 26-27) tell the tale: *Forrest v. Hanson*, 9 F. Cas. 456 (C.C.D.C. 1802); *Merchant v. Lewis*, 17 F. Cas. 37 (C.C.S.D. Ohio 1857); and J.G. Sutherland, *A Treatise on the Law of Damages* (2d ed. 1883). The sole authority cited from the Twentieth Century is *Hutton & Bourbonnais, Inc. v. Cook*, 92 S.E. 355 (N.C. 1917), and the language put forward from it is an ornamental quotation purely – not a holding – cast in the past tense ("have been described").

Written over half a century ago, Dean McCormick's venerable *Handbook on the Law of Damages*, also relied on by Farrar (Pet. Br., p.26 n.12), notes that even as of that time only about a third of the states retained the "peg for costs" rule and that elsewhere – including federal court, of which more later – quite different rules obtain:

> Many of the statutes are general in their scope and are designed to penalize any plaintiff who sues for debt or damages in the trial court of general jurisdiction, the smallness of whose recovery shows that he should have sued in a justice's court or some other inferior court, by denying him costs. Others are more limited and follow the type of the English "forty shilling" statue by restricting costs where only trivial damages are recovered in actions for such torts

> as libel, slander, and malicious prosecution. Seldom do such special statutes of this latter type touch contract cases. But, all in all, the plaintiff to-day can by no means invariably rely upon a judgment for nominal damages as a "peg" for costs.

McCormick, *supra*, § 24 at 94-95 (footnote omitted).

Thus, it was necessary for the Farrars to consult and cite a work almost sixty years old in order to find and advance any significant support for the "peg for costs" view of nominal damages, and even by then it had become a minority one.[30]

By the same token, the Farrar brief asserts (Pet. Br., p.28) that this Court has repeatedly sustained the recovery of costs by a party who received only nominal damages, supporting the assertion with a string-cite of seven cases; but once more the dates speak volumes: The most recent case cited is *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), decided forty-three years before § 1988 was amended to authorize awards of attorneys' fees "as part of the costs."

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[30] The Farrars' brief also cites to and quotes from a footnote in Dean McCormick's work remarking that one "who recovers nominal damages is the 'prevailing party' under modern statutes giving costs to the 'prevailing party.' " McCormick, *supra*, at 93 n.46. Omitted is the fact that the two cases cited in support of the proposition were decided in 1846 and 1909, and, as shown below, that at the time of Dean McCormick's writing in 1935 most plaintiffs in federal court who recovered less than $500 damages could not recover costs but were subject to having costs adjudged against them. 28 U.S.C. § 815 (repealed).

Of more significance, from 1789 until after the time of Dean McCormick's handbook, costs in federal courts were, as noted above, subject to 28 U.S.C. § 815 (repealed). Section 815 provided that a plaintiff shall recover no costs if he "recovers less than the sum or value of $500. . . . " *See* Phillip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 Va. L. Rev. 397, 414 (1935). Thus, the last word from Congress on nominal damages as a "peg for costs."

The modern rule with respect to costs is set forth in Fed. R. Civ. P. 54(d):

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Adopted in 1937, this rule did not contemplate the award of costs when a plaintiff received only nominal damages. As the notes of the Advisory Committee on the Federal Rules of Civil Procedure show, it was intended that 28 U.S.C. § 815, which remained in effect until 1948, would be "unaffected by this rule." Thus, the drafters of Rule 54(d) clearly did not contemplate that a plaintiff who received only nominal damages would be a "prevailing party" under that rule.[31]

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[31] While some courts have awarded costs under Rule 54(d) to parties obtaining only nominal damages, *see, e.g.,*

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IV. The district court clearly abused its discretion in setting the amount of the fee award.

Because it found that the Farrars were not entitled to *any* award under § 1988, the Fifth Circuit did not reach Hobby's alternative argument that the district court clearly abused its discretion in awarding attorneys' fees in this case. That argument has been preserved by Hobby throughout the case and would require reversal of the district court's fee award even if Petitioners' "prevailing party" argument were accepted.

This Court established the proper analysis for determining the amount of a § 1988 attorneys' fees award in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983): "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." This amount (the "lodestar fee") is appropriate compensation when a plaintiff has obtained "excellent results." *Id.* at 435. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* at 440. Thus, where "a plaintiff has achieved only partial or limited success," the lodestar fee "may be an excessive amount." *Id.* at 436. In such cases, "the district court should award only that amount of fees that is reasonable

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Burk v. Unified School Dist. No. 329, Wabaunsee County, 116 F.R.D. 16, 17-18 (D. Kan. 1987); *Western Elec. Co. v. William Sales Co.*, 236 F. Supp. 73, 77 (D.N.C. 1964), none has analyzed the question whether a party recovering only nominal damages is a "prevailing party."

in relation to the results obtained." *Id.* at 440. *Accord Garland*, 489 U.S. at 783 ("[T]he *degree* of the plaintiff's success in relation to the overall goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee. . . . "). In addition, the legislative history of § 1988 reflects that the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), are also relevant. *See Hensley*, 461 U.S. at 429-30.

The district court abused its discretion by failing to apply the above standards in this case. Even if one or both of the Farrars may somehow be characterized as "prevailing parties" under § 1988, the amount of the district court's award is excessive. The degree of the Farrars' "success" relative to the scope of the entire litigation compels a denial of any fees or at least a vast reduction in their amount. Instead, the district court awarded the Farrars the entire amount of their lodestar fee. As is demonstrated below, the district court erred in doing so.

A. The district court erred in awarding fees to both of the Farrars based upon a finding regarding only Joseph Farrar's estate.

Joseph Farrar's estate ultimately became entitled to the entry of a judgment in an amount not to exceed $1.00 in nominal damages based upon the jury's response to special interrogatory number 7. This finding cannot benefit Dale Farrar, however, since it was specific to Joseph Farrar alone.[32] There is nothing in the jury's verdict or in

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[32] The finding does not benefit Joseph Farrar either, since he is deceased.

the Fifth Circuit's holding in the prior appeal on which Dale Farrar can rely to warrant his recovery of attorneys' fees.

The district court, nevertheless, awarded attorneys' fees and expenses to *both* plaintiffs, based upon the work of their mutual counsel, without any apportionment or reduction. Even within the boundaries of the district court's own analysis of "prevailing party" under section 1988, this ruling cannot stand. That is, even if the district court is correct in its premise that the sole finding regarding Joseph Farrar supports an award of attorneys' fees, it does not follow that the same finding supports an award for Dale Farrar. *See, e.g., Albright v. Good Shepherd Hosp.*, 901 F.2d 438 (5th Cir. 1990) (reversing § 1988 award to two plaintiffs against same defendant where one plaintiff's recovery was reversed on appeal).

B. The "results obtained" by the Farrars are insufficient to support the amount of fees awarded.

Among the twelve factors that the district courts must consider in setting an award under § 1988 is "the amount involved and the results obtained." *Johnson*, 488 F.2d at 718. In *Hensley*, this Court held that "the most critical factor is the degree of success obtained." 461 U.S. at 436. In other words, "[t]he *result* is what matters." *Id.* at 435. The district court failed properly to consider this "critical factor" in its analysis. The amount of the fee award is grossly excessive compared to the result the Farrars obtained.

The district judge gave only cursory attention to this factor in his memorandum opinion: "[T]he results

obtained are significant, but possibly less clearly than the Farrars wanted. That will be treated as a neutral factor. The finding of vindication is significant and especially to people who must continue to live and do business in a mostly rural Texas county." (Pet. App., pp.26-27).

At best, the district court's analysis is conclusory. But a "mere conclusory statement" does not satisfy this Court's test. *Hensley,* 461 U.S. at 439 n.15. The trial court's analysis is woefully inadequate because it does not assess the amount the Farrars sought in light of the "results obtained." *See id.* at 440. Instead, the district court dismissed consideration of the amount involved ($17 million) "as lawyer hyperbole." (Pet. App., p.26).

Moreover, the district court failed to consider the gross disparity between the amount of attorneys' fees and the amount Joseph Farrar recovered. But "[w]here recovery of private damages is the purpose of civil rights litigation, a district court in fixing fees, is obligated to give *primary consideration* to the amount of damages awarded as compared to the amount sought." *Rivera,* 477 U.S. at 595 (Powell, J., concurring.) Even the dissenting judge on the panel below would have ordered the district court to reconsider the amount of its large fee, under the circumstances. 941 F.2d at 1317 (Reavley, J., dissenting).

"[I]t would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages." *Rivera,* 477 U.S. at 587 (Burger, C.J., dissenting). Unfortunately, the present case provides a much "better" example: the district court fixed attorneys' fees and costs

at $307,932 (plus interest) for the recovery of a sum not to exceed $1.00 in damages. Although a majority of this Court in *Rivera* rejected the proposition that fee awards must always be proportionate to the amount of damages recovered, the plurality opinion nonetheless held that "[t]he amount of damages a plaintiff recovers is *certainly relevant* to the amount of attorney's fees to be awarded under § 1988." *Id.* at 574.[33] The fees awarded here exceed the damages by a staggering factor of more than *three hundred thousand.* The distinction in *Rivera,* which justified attorneys' fees of seven times the amount of damages, is that the district court expressly found that the plaintiffs' attorneys had obtained "excellent results" for them in the underlying litigation. *Id.* at 572. Here, there was no such finding. The best that the district court could say of the "results obtained" is that this was a "neutral factor." (Pet. App., p.27).

The district courts are not at liberty to pick and choose from among the criteria that this Court has established for setting fee awards under section 1988. The district court in this case clearly abused its discretion in failing to apply these criteria. Given all of the relevant factors, the only appropriate exercise of discretion would be to deny or greatly reduce all fees and costs.

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[33] "Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give *primary consideration* to the amount of damages awarded as compared to the amount sought." *Id.* at 585 (Powell, J., concurring).

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed, unless the writ of certiorari is dismissed as improvidently granted. Alternatively, this case should be remanded to the Court of Appeals with appropriate instructions for consideration of whether the fee-awarding trial judge properly exercised his discretion, as required by 42 U.S.C. § 1988.

Respectfully submitted,

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June 1992

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(3)

No. 91-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DALE FARRAR, *et al.*,

Petitioners,

v.

WILLIAM HOBBY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Bar Association ("ABA") hereby requests, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amicus curiae* in support of petitioners. The ABA obtained the consent of the petitioners to the filing of this brief.[1] Counsel for respondent, however, refused to grant consent.

The ABA is the leading national membership organization of the legal profession, numbering more

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[1] A letter of consent from petitioners has been lodged with the Clerk of the Court.

than 365,000 members throughout the United States. The ABA's membership includes many lawyers who regularly represent plaintiffs in civil rights, antitrust, environmental, and other types of federal litigation in which, by federal statute, courts are empowered to award "reasonable attorney's fees" to prevailing parties.

As the national organization of the bar, the ABA has long promulgated standards of professional responsibility, including standards governing the fees that attorneys may charge for their services. The ABA also has recognized the legal profession's duty to help enforce our nation's civil rights laws. The ABA has contributed to the development of federal fee-shifting statutes, and, in light of its leadership role, has participated as *amicus curiae* in previous cases before this Court concerning the interpretation of these statutes.[2]

The practical interest of the ABA's members in the proper application of fee-shifting statutes, the commitment of the ABA and its members to the development of proper ethical standards for attorney service and compensation, and the commitment of the ABA and its members to the protection of constitutional norms give the ABA a strong and unique interest in this case as *amicus curiae*. The ABA believes that its perspective on the issues presented by petitioners will assist the Court in evaluating the decision of the court of appeals.

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[2] See *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). The ABA also is filing a brief as *amicus curiae* in *City of Burlington* v. *Dague*, No. 91-810.

For the foregoing reasons, the ABA's Motion for Leave to File a Brief as *Amicus Curiae* in Support of Petitioners should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether 42 U.S.C. § 1988 authorizes the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages.

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The interest of the American Bar Association as *amicus curiae* is fully set forth in the Motion for Leave to File a Brief as *Amicus Curiae* in Support of Petitioners.

SUMMARY OF ARGUMENT

Congress enacted 42 U.S.C. § 1988 to enable plaintiffs to vindicate the fundamental national policies underlying the civil rights laws. "[U]nless rea-

sonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986). This is because "a vast majority of the victims of civil rights violations cannot afford legal counsel" and because many civil rights claims have a "severely limit[ed]" potential for damages. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 9 (1976). Indeed, consistent with this congressional policy, this Court has recognized "the importance to organized society" of prosecuting civil rights actions even where the victim of a constitutional violation has suffered no "actual injury" apart from the denial of a constitutional right and where, as a consequence, the only damages recoverable are nominal. See *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Thus, an explicit rationale of Section 1988 was the need to provide an incentive for the prosecution of civil rights actions that were likely to result in little or no damage recoveries for the plaintiff.

Given the recognition by Congress and by this Court that lawsuits brought to vindicate constitutional rights serve a vital public purpose even when they do not yield significant damage recoveries, there is clearly no basis upon which to hold that a plaintiff who succeeds in such an action is not a "prevailing party" because his damages are only nominal. Time and again, this Court has made clear that Section 1988's "prevailing party" requirement entails only a minimal "threshold" inquiry, and that a party may be said to have "prevail[ed]" where he "has succeeded on 'any significant issue'" presented in the litigation, *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*,

489 U.S. 782, 791 (1989), and where, as a result, he "receive[s] at least some of the relief on the merits of his claim." *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987). Once this test is met, "the degree of the plaintiff's overall success goes [only] to the reasonableness of the award . . ., not to the availability of a fee award *vel non*." *Texas State Teachers*, 489 U.S. at 793.

The court below contravened this teaching by making the availability of a fee award in a civil rights action turn, not on whether the plaintiff in fact has succeeded in obtaining relief on the merits of his claim, but rather on the *degree* of the plaintiff's success as measured by the dollar value of the damages awarded. In so doing, the court of appeals extended dramatically this Court's rulings in *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), and *Helms*, 482 U.S. 755, which had announced only the "common sense" proposition that a plaintiff cannot be said to have prevailed where he has obtained *no relief whatsoever* from the defendant.

The fact that petitioners recovered only one dollar out of the $17 million they requested should not prevent them from crossing the statutory threshold to a fee award of some kind. The magnitude of the recovery should be a factor solely in determining the amount of fees that ultimately are awarded. Although the degree of a plaintiff's success is not relevant to whether he is a "prevailing party," it is clearly relevant to determining what fee is "reasonable" under all the circumstances. See *Texas State Teachers*, 489 U.S. at 790; *Hensley* v. *Eckerhart*, 461 U.S. 424, 436 (1983). For this reason, it does not follow inexorably that simply because a plaintiff "prevails," even though

the success is limited, he or she will receive a large award of attorney's fees.

ARGUMENT

I. THE LANGUAGE, PURPOSE, AND HISTORY OF 42 U.S.C. § 1988 DEMONSTRATE CLEARLY THAT CONGRESS INTENDED THAT PREVAILING PLAINTIFFS, EVEN THOSE WHO RECOVER ONLY NOMINAL DAMAGES, ARE ENTITLED TO RECOVER REASONABLE FEE AWARDS.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides in relevant part:

> In any action or proceeding to enforce a provision of sections [1981, 1982, 1983, 1985, and 1986 of this title], title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Congress enacted Section 1988 in response to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), which had "reaffirmed the 'American Rule' that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary." *Hensley*, 461 U.S. at 429.

Congress' swift response to *Alyeska* was grounded in the determination that civil rights plaintiffs too often were unable to secure legal representation in the private legal services market and that, as a result, violations of important federal rights went unredressed. "Because a vast majority of the victims of civil rights violations cannot afford legal counsel,"

Congress observed, "they are unable to present their cases to the courts." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). Moreover, "while damages are theoretically available under the statutes covered by [Section 1988], . . . immunity doctrines and special defenses, available only to public officials, [may] preclude or severely limit the damage remedy." *Id.* at 9. Consequently, as a general matter, "civil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiff with a large recovery from which he can pay his lawyer." 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Kennedy).

Fearful that these factors were causing many meritorious civil rights claims to go unprosecuted, Congress enacted Section 1988 "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 1558, *supra*, at 1).[3] "[F]ee awards," the Senate report noted,

> have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

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[3] See also *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) ("unless reasonable attorney's fees could be awarded for bringing these actions, Congress found that many legitimate claims would not be redressed").

S. Rep. No. 1011, 94th Cong., 2d Sess. 2 ("Senate Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5910 (indication of paragraph break omitted).[4]

Thus, Congress not only recognized that successful civil rights actions often would not end in sizable damage awards, but also emphasized that "awarding counsel fees to prevailing plaintiffs in such litigation is *particularly important* and necessary if Federal civil and constitutional rights are to be adequately protected." H.R. Rep. No. 1558, *supra*, at 9 (emphasis added).[5] Accordingly, "the amount of fees awarded . . . [should] not be reduced because the rights involved may be nonpecuniary in nature." Senate Report, *supra*, at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913.

Two years after Congress enacted Section 1988, this Court confirmed Congress' understanding that the rights at stake in litigation covered by the fee-shifting statute often would "be nonpecuniary in nature." In *Carey* v. *Piphus*, 435 U.S. 247 (1978), the

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[4] This Court regularly has relied upon these legislative reports in discerning Congress' intent with respect to the fee-shifting provision contained in Section 1988, as well as those found in other federal statutes. See, *e.g.*, *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560; *City of Riverside* v. *Rivera*, 477 U.S. 561, 575-78 (1986) (plurality opinion); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429-30 (1983); *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

[5] See also *Rivera*, 477 U.S. at 577 ("Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so").

Court held that, absent proof of some "actual injury" resulting from the deprivation of a constitutional right, a plaintiff who prevails in asserting a constitutional violation is entitled only to nominal damages. "By making the deprivation of such rights actionable for nominal damages without proof of actual injury," the Court explained, "the law recognizes the importance to organized society that those rights be scrupulously observed . . .." *Id.* at 266.

Thus, this Court in *Carey*, like Congress before it, recognized that plaintiffs perform a service "importan[t] to organized society" when they vindicate their civil rights in court, even though their lawsuits may result in nothing more than an award of nominal damages. As the legislative history of Section 1988 makes clear, it was the prosecution of precisely this sort of lawsuit that Congress sought to encourage through the fee-shifting mechanism—lawsuits that, although not economically attractive from a lawyer's point of view, nonetheless "vindicate the important Congressional policies which these [civil rights] laws contain." Senate Report, *supra*, at 2, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910. Plainly, a rule such as that applied by the court of appeals in this case—holding that a civil rights plaintiff who brings a damage action does not "prevail" unless the damages awarded are substantial—directly contravenes Congress' purpose in enacting Section 1988.

II. THIS COURT'S CASES MAKE CLEAR THAT A PLAINTIFF WHO RECOVERS NOMINAL DAMAGES IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER § 1988.

A. The "Prevailing Party" Requirement Is Only A "Threshold" Inquiry.

An essential predicate, of course, to any award of attorney's fees under Section 1988 is that the plaintiff must be a "prevailing party." But, as this Court has made clear, the burden a plaintiff must carry to cross this "statutory threshold" was never intended to be a heavy one. A party need not prevail on all or even most of the issues presented in a lawsuit. *Hensley*, 461 U.S. at 435 & n.11. Nor must a party prevail on the "central issue" at stake in the litigation or achieve the "primary relief sought." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-91 (1989). Rather, "[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92 (quoting *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).[6]

At bottom, the inquiry is a pragmatic one. Thus, this Court has held that a plaintiff may be a "prevailing party" even where there has been no "judicial determination that the plaintiff's rights have been violated," so long as a settlement favorable to the plaintiff has been struck. *Maher* v. *Gagne*, 448 U.S.

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[6] As the Court concluded in *Hensley*, 461 U.S. at 433:

> This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

122, 129 (1980). On the other hand, a judicial determination that the plaintiff's rights have been violated, standing alone and without any possibility that the plaintiff will ever obtain any relief from the defendant, is insufficient to make the plaintiff a "prevailing party." See *Rhodes* v. *Stewart*, 488 U.S. 1 (1988); *Hewitt* v. *Helms*, 482 U.S. 755 (1987). Accordingly, a plaintiff does not "prevail" in litigation if he obtains only a judicial finding of unconstitutional conduct for which the defendants are immune from all liability, see *Helms*, *supra*, or if he obtains only a declaratory judgment that is unenforceable because the case was moot when judgment was entered, see *Stewart*, *supra*. The rationale for this result is that "[a]t the end of the rainbow lies not a judgment, but some action . . . by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct." *Helms*, 482 U.S. at 761. In sum,

> [t]he touchstone of the prevailing party inquiry [is] . . . the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

Texas State Teachers, 489 U.S. at 792-93.

As this Court's cases make plain, what counts in determining whether a plaintiff has "prevailed" is whether the plaintiff has obtained a judgment that is both favorable, in the sense that it finds that the defendant has violated the plaintiff's civil rights, and

enforceable, in the sense that the defendant is not free to ignore it. As should also be plain, however, especially given the value Congress assigned in enacting Section 1988 to the vindication of "nonpecuniary" civil rights, a judgment need not result in any particular "degree" of relief once a violation has been found and remedied by some judicial action.

B. The Court Below Erred In Making The Plaintiffs' Status As "Prevailing Parties" Contingent Upon The Size Of The Damage Award They Obtained.

The petitioners in this case obtained an enforceable judgment holding the respondent liable in damages for the violation of petitioners' civil rights. Respondent is not free to ignore the jury's verdict or to treat it as merely advisory. Moreover, upon execution of the judgment, respondent will have paid over to the petitioners the court-ordered compensation for the constitutional violation he has been adjudged to have committed. The petitioners' lawsuit therefore not only succeeded in vindicating their constitutional rights, but also effected a "change[] [in] the legal relationship" between the parties, see *Texas State Teachers*, 489 U.S. at 792, and produced "some action . . . by the defendant"—namely, "the payment of damages." *Helms*, 482 U.S. at 761.

Nevertheless, the court of appeals in this case held that the petitioners did not qualify as "prevailing parties" under Section 1988 because the *amount* of the damages they received, compared to the amount of damages they sought, rendered their victory "merely . . . technical." *Estate of Farrar* v. *Cain*, 941 F.2d 1311, 1315-16 (5th Cir. 1991). That holding is squarely at odds with this Court's instruction that the prevailing-party requirement is satisfied where the

plaintiff "has succeeded on 'any significant issue'" in the litigation, *Texas State Teachers*, 489 U.S. at 791, and, as a result, has "receive[d] at least some relief on the merits of his claim," *Helms*, 482 U.S. at 760.[7] The rule also is inconsistent with this Court's holding that the prevailing-party requirement should not impose a heavy burden on a plaintiff.[8]

Indeed, the Fifth Circuit's rule in the instant case suffers from precisely the same defects that led this Court to reject the "central issue" test that the Fifth Circuit previously propounded to govern prevailing-

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[7] Not surprisingly, the Fifth Circuit's decision is also at odds with the established rule in other circuits, which have recognized that the congressional purposes underlying Section 1988, as well as this Court's decisions interpreting the statute, compel the conclusion that a plaintiff "prevails" when he obtains a damage award—of any size—against the defendant. See, *e.g.*, *Ruggiero* v. *Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991); *Allen* v. *Higgins*, 902 F.2d 682, 684 (8th Cir. 1990); *Scofield* v. *City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988); *Nephew* v. *City of Aurora*, 830 F.2d 1547, 1553 n.2 (10th Cir. 1987) (*en banc*), *cert. denied*, 485 U.S. 976 (1988); *Garner* v. *Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987); *Ganey* v. *Edwards*, 759 F.2d 337, 339-40 (4th Cir. 1985); *Skoda* v. *Fontani*, 646 F.2d 1193, 1194 (7th Cir. 1981) (*per curiam*); see also 1 M. Derfner & A. Wolf, *Court Ordered Attorney Fees* ¶ 8.03[2][a], at pp. 8-20 through 8-21 (rev. ed. 1991) ("[B]ecause a plaintiff prevails when he has obtained 'some relief,' a plaintiff prevails when he obtains less—even far less—than he sought, such as when he recovers only nominal damages") (footnote collecting cases omitted).

[8] In this regard, the prevailing-party requirement is similar to the injury-in-fact requirement in standing analysis: it is the *fact* of concrete injury, not any particular magnitude of injury, that is required to get a plaintiff across the threshold. See, *e.g.*, *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973).

party status. In *Texas State Teachers*, this Court held that the Fifth Circuit's "central issue" test—under which a party would be considered "prevailing" only if it "prevailed on the central issue [in the case] by acquiring the primary relief sought"—was inconsistent with Section 1988 because it made the plaintiff's eligibility for a fee award turn on "the *degree* of the plaintiff's success" rather than on the simple *fact* of the plaintiff's success. *Texas State Teachers*, 489 U.S. at 790 (emphasis in original).

Moreover, this Court found the "central issue" test deficient because it rendered the award of fees contingent on the timing of the fee request. Thus, a plaintiff could receive an award of fees for the successful portions of its case prior to final judgment, but would not be entitled to fees for the same work if no application were made until after an ultimately adverse judgment on the litigation's "central issue." See *id.* at 790-91.

Finally, the Court found that the "central issue" test had little "to recommend it from the viewpoint of judicial administration" because "it asks a question which is almost impossible [for courts reliably] to answer." *Id.* at 791. In requiring that courts identify the "central issue" in any litigation or "the primary relief" sought in any given case, the Fifth Circuit's test forced courts to undertake an " 'excruciating[ly]' " difficult inquiry and made the ultimate availability of a fee award "depend largely on the mental state of the parties" in bringing the action, a matter "wholly irrelevant to the purposes behind the fee shifting provisions." *Id.*

The Fifth Circuit's "nominal damages" exception suffers from each of these same defects. Here, the

court of appeals held that a plaintiff who has won a judgment of liability against a defendant and an enforceable award of money damages nonetheless is not a "prevailing party" if the court perceives that the plaintiff's "singular objective" in bringing the action was financial and that the amount of recovery is sufficiently small to be "disappointing." This demands that courts perform precisely the type of inquiry the Court condemned in *Texas State Teachers*.

First, the Fifth Circuit's rule makes the availability of any fee award contingent upon "the degree of the plaintiff's success." Here, plaintiffs clearly have satisfied the requirement articulated in *Helms* and *Stewart*—*i.e.*, they have obtained an enforceable judgment that has produced action by the defendant's paying them damages. Yet, the Fifth Circuit now demands something more, *viz.*, that the *degree* or *magnitude* of the money award be sufficiently large to qualify, in the court's subjective judgment, as a victory. This Court, however, has made clear that this additional requirement is inappropriate: "[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, *not* to eligibility for a fee award at all." *Texas State Teachers*, 489 U.S. at 790 (second emphasis added).

Second, the Fifth Circuit's rule would render the availability of a fee award potentially dependent "on the timing of a request for fees." *Id.* at 791. In bifurcated cases, in which juries assess liability and damages in separate proceedings, plaintiffs could recover awards of attorney's fees *pendente lite* before damage juries decide that only nominal damages are appropriate. Yet, these same plaintiffs could recover

no fee awards at all if their applications were delayed until final judgment. As the Court made clear in *Texas State Teachers*, this result could not have been what Congress intended in enacting Section 1988. See *id.* ("Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees . . ."); cf. *Helms*, 482 U.S. at 762 ("There is no warrant for having status as a 'prevailing party' depend upon the essentially arbitrary order in which the district court . . . choose[s] to address issues").

Third, the Fifth Circuit's test "asks a question which is almost impossible to answer," *Texas State Teachers*, 489 U.S. at 791, requiring courts to assess whether a plaintiff's "singular object" is a lucrative award of money damages and whether the particular amount of damages awarded is sufficiently lucrative to qualify as more than a "technical" victory. As an initial matter, the latter inquiry involves impossible line-drawing exercises. If a $1 recovery can be disregarded for purposes of determining whether the party has obtained "meaningful" relief, what of a $50 recovery, or a $500 recovery?

Moreover, the initial inquiry required by the Fifth Circuit's rule—whether the essential purpose of the plaintiff's lawsuit was to obtain substantial damages—is fundamentally hopeless as a rule of decision. Suppose, for example, that the petitioners here never had claimed any "actual injury" apart from the denial of their constitutional rights and, accordingly, had confined the relief they sought to nominal damages. *Carey v. Piphus* recognizes—as did Congress itself in enacting Section 1988—that a plaintiff who has suffered no "actual injury" from a constitutional violation may nonetheless elect to sue for nominal damages

and, in doing so, will vindicate principles "importan[t] to organized society." See 435 U.S. at 266.[9] Had the petitioners so confined their allegations in this case, they would have obtained precisely what they sought and their victory could not be dismissed as "merely . . . technical." The result should be no different simply because they added to their complaint an allegation of "actual injury" and a claim for corresponding compensation that the jury ultimately rejected.

The court of appeals in this case has drawn precisely this distinction, making the plaintiff's entitlement to fees turn, in effect, upon its primary motivation in bringing suit. As with the "central issue" test, "[t]his question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts . . . in an inquiry which . . . [can rightly be] described as 'excruciating.'" *Texas State Teachers*, 489 U.S. at 791.[10]

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[9] Indeed, in such actions, this Court has recognized that "the potential liability of . . . defendants for attorney's fees" under Section 1988 itself serves as a valuable deterrent to constitutional violations. See *Carey*, 435 U.S. at 257 n.11.

[10] Any inquiry into motivation is inherently difficult, but the problem seems unusually intractable when the question is the motivation for litigation. There is at least a serious question about whose motivation the Court is reviewing—the attorney's or the plaintiff's. It is far from clear that they will have a common motivation. In one case, a plaintiff may wish to sue to vindicate his rights, while the lawyer may bring the action in the hope of winning a damage award from which he may obtain his fee. In another case, the litigant may care nothing about the constitutional issue, but the attorney may be far more con-

In sum, in holding that judges may deny "prevailing party" status to a plaintiff who has vindicated his constitutional rights and obtained in court an enforceable judgment for monetary relief, based solely upon the *size* of the damage award, the court of appeals has extended the rationales of *Helms* and *Stewart* well beyond their "common sense" moorings. If upheld, this ruling will thrust the courts into a sensitive area of decisionmaking in which there are few guideposts to channel judicial discretion. A hard-and-fast rule denying attorney's fees to civil rights plaintiffs who obtain a judgment only for nominal damages would fly in the face of Congress' intent in enacting Section 1988—*i.e.*, to enable the prosecution of lawsuits to vindicate rights that, although vitally important, "may be nonpecuniary in nature." A more flexible rule—for example, one that permits fee awards in nominal-damage actions involving some "genuine" struggle over constitutional principles but denies them in cases where a plaintiff's primary motivation in bringing suit is thought to be pecuniary[11]—would call upon the courts to make impossible judgment calls. There are no reliable standards by which to assess the "essen-

cerned with that aspect of the case. It would be almost impossible in a single set of pleadings for a court to discern what the plaintiff's real motivation is in pursuing a particular case because there is no way to know whose motive—litigant's or lawyer's—is revealed in the submissions involved in the litigation.

[11] This appears to be the rule applied by the court of appeals:

> [W]e hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more.

Estate of Farrar v. *Cain*, 941 F.2d 1311, 1315 (5th Cir. 1991).

tial" purpose of a lawsuit or the minimum money judgment necessary to render a legal victory "real" rather than "merely . . . technical." Accordingly, the ruling of the court of appeals in this case departs without justification from Congress' intention in Section 1988 to make legal counsel available even to those civil rights plaintiffs whose claims, although meritorious, "may be nonpecuniary in nature."

C. The Limited Nature Of A Prevailing Party's Success Is Properly Reflected In The Amount Of Attorney's Fees Awarded.

The fact that petitioners recovered only one dollar out of the $17 million they requested should not prevent them from crossing the statutory threshold to a fee award of some kind, but rather should be reflected in the amount of fees they ultimately recover. As this Court has explained, in complex civil rights litigation,

> [a]lthough the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.

Hensley, 461 U.S. at 436. Accordingly, "the *degree* of the plaintiff's success in relation to the . . . goals of the lawsuit is a factor critical to the determination of the *size* of a reasonable fee, not to eligibility for a fee award at all." *Texas State Teachers*, 489 U.S. at 790 (second emphasis added).

This Court has emphasized that "the district court has discretion in determining the amount of a fee award" and, with its "superior understanding of the litigation," is best able to assess whether the "relief

obtained justified th[e] expenditure of attorney time" for which fees are sought. *Hensley*, 461 U.S. at 436-37 & n.11. In situations where the relief obtained is limited, district courts may, in the exercise of their equitable discretion, "identify specific hours that should be eliminated [from the lodestar] or . . . simply reduc[e] the award to account for the limited success." *Texas State Teachers*, 489 U.S. at 789-90; see also *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989).

This is not to say, of course, that the amount of damages that plaintiffs recover under civil rights or other federal fee-shifting statutes is the determinative, or even necessarily a weighty, factor for purposes of establishing a reasonable fee award. The importance of some federal rights cannot be measured in monetary terms, see, *e.g.*, *Carey*, 435 U.S. at 266, yet Congress made plain that fee awards should not be reduced simply "because the rights involved may be nonpecuniary in nature." Senate Report, *supra*, at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Accordingly, this Court correctly has rejected a strict rule of proportionality in assessing the amount of a fee award, see *City of Riverside* v. *Rivera*, 477 U.S. 561 (1986), and Congress has not seen fit to change the statute to provide otherwise.

On the other hand, depending upon the nature of the case and the relief sought, the amount of damages recovered may well be the most significant indication of the plaintiff's "degree" of success. As this Court has explained, "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 440; see also *Rivera*, 477 U.S. at 574 ("The amount of damages a plaintiff recovers

is certainly relevant to the amount of attorney's fees to be awarded under § 1988"). In the exercise of their sound discretion, and given their greater familiarity with the litigation, district courts are fully capable of undertaking such comparisons.[12]

Under this approach, there is no risk that courts' recognition of plaintiffs' status as "prevailing parties" necessarily will result in unwarranted awards of fees. By acknowledging that parties such as petitioners here have crossed the bare "statutory threshold" of being prevailing parties, courts still can account for any limitation in the parties' success in the calculation of the "reasonable fee," thereby carrying out Congress' intention that statutory fee awards be "adequate to attract competent counsel, but . . . not produce windfalls to attorneys." Senate Report, *supra*, at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Accordingly, concern about the magnitude of fee awards is no basis for imposing a flat prohibition, not found in the statute, on attorney's fees in cases involving only nominal damages. Instead, the courts can deal with the magnitude of the award directly by ensuring that the award is "reasonable" within the meaning of Section 1988.

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[12] Unlike determining the "central issue" or "primary relief sought," which entails an " 'excruciating[ly]' " difficult inquiry into the plaintiff's mental state, assessing the degree of success in light of the entire litigation is a straightforward task that this Court has repeatedly entrusted to district courts. See, *e.g.*, *Hensley*, 461 U.S. at 440; *Blanchard*, 489 U.S. at 96; *Texas State Teachers*, 489 U.S. at 789-90.

CONCLUSION

For the reasons stated above, the ABA submits that the Civil Rights Attorney's Fees Awards Act of 1976 authorizes the award of reasonable attorney's fees in cases in which civil rights plaintiffs recover nominal damages.

Respectfully submitted,

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April 9, 1992

(7)

No. 91-690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,
Petitioners,

v.

WILLIAM P. HOBBY, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

MOTION TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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June 15, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-990

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,
Petitioners,

v.

WILLIAM P. HOBBY, JR.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of

William P. Hobby, Jr., Respondent, whose written consent has been provided to the Clerk of the Court. Counsel for EEAC repeatedly has attempted to secure the consent of counsel for Petitioners but has received no response. In support of this motion, EEAC by the following shows that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. The Equal Employment Advisory Council (EEAC) is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The issue before the Court in this case involves the proper interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. One of the statutes covered by Section 1988 is 42 U.S.C. § 1981, which often is used as a basis for lawsuits challenging employment practices of private employers. Moreover, the fee-shifting provisions of Section 1988 and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), contain virtually the same language and have been given similar interpretations by the courts. The manner in which the Court interprets Section 1988 in the instant case, therefore, will have an important impact on the availability of attorney's fee awards in employment discrimination litigation. Because all of EEAC's members, and the constituents of its association members, are employers subject to the attorney's fees provisions of both Section 1988 and Title VII, those members have had much experience in matters relating to attorney's fee awards. Thus, EEAC's members have a direct interest in the outcome of this case.

3. The issue presented in this appeal is extremely important to the nationwide constituency that EEAC represents. The Fifth Circuit Court of Appeals ruled that a civil rights plaintiff who seeks only money damages and receives merely one dollar in nominal damages is not a "prevailing party" entitled to an award of attorney's fees under Section 1988. This conclusion is consistent with this Court's recent decisions regarding the proper interpretation of the term "prevailing party."

4. Motivated by its concern for how Section 1988 and similar attorney's fee provisions are interpreted, EEAC has filed *amicus curiae* briefs in this Court in *West Virginia Univ. Hospitals, Inc. v. Casey*, 111 S. Ct. 1138 (1991) (concerning the maximum amount of expert witness fees that may be awarded); *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (concerning proportionality of fees to the amount of damages recovered); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (concerning the simultaneous negotiation of attorney's fees and the merits in civil rights class actions); *Marek v. Chesny*, 473 U.S. 1 (1985) (concerning the interplay between Section 1988 and Fed. R. Civ. P. 68); *Webb v. Bd. of Educ. of Dyer County, Tenn.*,

471 U.S. 234 (1985) (concerning whether Section 1988 authorizes the recovery of attorney's fees incurred in optional state administrative proceedings); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (concerning whether a partially successful plaintiff may recover attorney's fees under Section 1988 for legal services on unsuccessful claims); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (concerning the proper standard to be used in deciding whether to award attorney's fees to a successful defendant in a Title VII action).

5. EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the instant case in the field of employment discrimination litigation generally. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of its substantial experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

Respectfully submitted,

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v.

WILLIAM P. HOBBY, JR.,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief urges affirmance of the decision below and thus supports the position of Respondent before this Court.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

The question presented by this case is whether the plaintiff can be considered a "prevailing party" when the sole benefit sought in the suit is money damages and the sole remedy awarded is one dollar. The issue arises from an action filed by petitioner's decedent Joseph D. Farrar against William P. Hobby, Jr., then Lieutenant Governor of the State of Texas, for civil rights violations under 42 U.S.C. § 1983; *Estate of Farrar v. Cain*, 941 F.2d 1311, 1312 (5th Cir. 1991).

When Farrar was charged with murder after a death at the youth facility he operated, Hobby became personally involved in the process leading to closure of the facility. After the murder indictment was dismissed, Farrar filed suit against Hobby and other officials for injunctive relief and monetary damages under 42 U.S.C. §§ 1983 and 1985. Farrar later amended the complaint to drop the injunction claim and increase the damages demand to $17 million. A jury found liability without harm and awarded no damages, and the district court entered judgment on the award. *Id.* at 1312-13.

On appeal, the Fifth Circuit reversed the judgment in part and remanded for an award of one dollar in nominal damages against Hobby alone. The district court then awarded $280,000 in attorney's fees against Hobby pursuant to 42 U.S.C. § 1988, which provides for an award of reasonable attorney's fees to a prevailing party. *Id.* at 1313.

On appeal of the fees award, the Fifth Circuit reversed. Using the standard developed by this Court in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989); *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Hewitt v. Helms*, 482 U.S. 755 (1987); and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Fifth Circuit ruled that plaintiffs did not qualify as "prevailing parties" under 42 U.S.C. § 1988:

> We are persuaded that the Farrars were *not* prevailing parties for the purposes of § 1988, and we therefore reverse. The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal victories are made."

Farrar, 941 F.2d at 1315 (quoting *Hewitt*, 482 U.S. at 760). This appeal followed.

SUMMARY OF ARGUMENT

A plaintiff who seeks no relief other than $17 million in damages, and receives no relief other than $1 in nominal damages, is not a "prevailing party" for purposes of 42 U.S.C. § 1988. This Court's unanimous holding in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), building on principles established in *Rhodes v. Stewart*, 488 U.S. 1 (1988); and *Hewitt v. Helms*, 482 U.S. 755 (1987), makes it clear that to cross the statutory threshold of "prevailing party," a plaintiff must achieve "some relief on the merits." 489 U.S. at 792. A $1 nominal damages award does not suffice.

Even if a plaintiff in this situation could be deemed a prevailing party, he would not necessarily be en-

titled to an attorney's fee of the magnitude awarded in this case by the district court. Congress did not mandate full hourly attorney's fee awards in every case, but only "reasonable" fees. Reasonableness requires that the fee award be somewhat proportionate to the results obtained—in this case, nominal.

Indeed, the policies underlying Section 1988 support limitation of an attorney's fee award in cases in which a plaintiff seeks only money and receives only nominal damages. This fee-shifting provision, designed to enable citizens to act as private attorneys general to vindicate important civil rights, does not stretch to cover the costs of individuals who achieve only technical or de minimis results, particularly when those results do not engender any degree of social change.

ARGUMENT

I. A PLAINTIFF WHO SEEKS ONLY MONEY DAMAGES AND RECOVERS ONLY $1 IS NOT A PREVAILING PARTY ENTITLED TO AN ATTORNEY'S FEE AWARD UNDER 42 U.S.C. § 1988

A. To Be A Prevailing Party Under This Court's Decisions in *Hewitt*, *Rhodes* and *Garland*, a Plaintiff Must Receive Actual Relief on the Merits

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is a fee-shifting provision which permits the court in a civil rights action to award a reasonable attorney's fee to the prevailing party as part of the costs assessed against the other party.[1] Determining a fee award thus is a two-stage

[1] Section 1988 of Title 42, United States Code, provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The standards articulated by this Court for awarding fees under 42 U.S.C. § 1988 are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,' " including the attorney's fees provision of Title II and VII of the Civil Rights Act of 1964. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

process. First, the plaintiff must meet the statutory threshold of "prevailing party." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).[2] Then, and only then, the court determines what fee is "reasonable." *Id.*

Accordingly, entitlement to *any* attorney's fee under § 1988 turns on whether or not the plaintiff "prevailed" in the litigation. This Court's unanimous decision in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), building on the foundation established in *Rhodes v. Stewart*, 488 U.S. 1 (1988), and *Hewitt v. Helms*, 482 U.S. 755 (1987), established recovery or non-recovery of actual relief on the merits as the standard used to ascertain whether or not a plaintiff has in fact prevailed.

"If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] *some of the benefit* the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some

[2] A prevailing-defendant can recover attorney's fees only if the "claim was frivolous, unreasonable, or groundless, . . . [if] the plaintiff continued to litigate after it clearly became so, . . . [or] if the plaintiff is found to have brought or continued such a claim in bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

kind." *Garland*, 489 U.S. at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)) (emphasis added). "Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792 (quoting *Hewitt*, 482 U.S. at 760-61 and *Rhodes*, 488 U.S. at 3-4). "Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status." *Id.*[3] "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied." *Id.*

Thus, this Court consistently looks to whether or not the plaintiff received any genuine relief on the merits in determining whether the plaintiff indeed "prevailed" in the litigation. A judgment in the plaintiff's favor does not suffice. *Rhodes*, 488 U.S. at 3. As the Court explained in *Hewitt*, the court—and the judgment—are merely the vehicle by which the plaintiff seeks to reach the intended destination, and only

[3] In *Hewitt*, although a prison inmate received a court decree that he was denied due process in a misconduct proceeding, he received no relief because of the defendants' official immunity. This Court concluded that he was not a prevailing party. *Hewitt v. Helms*, 482 U.S. 755 (1987). In *Rhodes*, two prison inmates won a declaratory judgment but no relief because in the interim, one had died and the other had been released. They thus were not prevailing parties. *Rhodes v. Stewart*, 488 U.S. 1 (1988).

by reaching that destination does the plaintiff "prevail."

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. . . . The real value of the judicial pronouncement—what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.

Hewitt, 482 U.S. at 761.

Applying this standard, the Fifth Circuit correctly ruled that Farrar was not a "prevailing party" in this litigation. Although the jury found that Lieutenant Governor Hobby had " 'committed an act or acts under color of state law that deprived Plaintiff Joseph Farrar of a civil right,' " 941 F.2d at 1312-13, it found no injury, and awarded no damages. Accordingly, instead of the $17 million he claimed,[4] Farrar received only $1 in nominal damages, a technical requirement because a civil rights violation was shown.[5]

[4] Farrar's claim for injunctive relief was dropped early in the litigation. *Farrar*, 941 F.2d at 1312.

[5] Although the jury awarded no damages, the Fifth Circuit initially reversed in part and directed the district court to enter an award of nominal damages, not to exceed one dollar, because a civil rights violation was shown. *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985) (citing *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978)). In *Carey*, this Court ruled that "the denial of procedural due process should be actionable

Accordingly, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt*, 482 U.S. at 762. Since Farrar achieved none of the $17 million benefit sought by the litigation, and the outcome "did not in any meaningful sense 'change the legal relationship' between the Farrars and Hobby," the Fifth Circuit concluded that Farrar had not prevailed. *Farrar*, 941 F.2d at 1315.[6]

B. Technical Success, Such As an Award of Nominal Damages, Does Not Constitute Relief Sufficient to Support an Award of Attorney's Fees

The Fifth Circuit's holding is consonant with this Court's clear direction in *Garland*, *Rhodes*, and *Hewitt* that to prevail is to achieve "some of the benefit" sought. *Garland*, 489 U.S. at 791-92. Farrar received no benefit from this litigation—no money damages, no injunctive relief, no change in the defendants' behavior—indeed, nothing that "changes the legal relationship" in any way. *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 847 (11th Cir. 1991) (holding that jury finding of sexual harrassment "no more altered the legal relationship between the parties than the Third Circuit's finding of a due process violation in *Hewitt*.").

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for nominal damages without proof of actual injury," and implied that the same rule applies to cases involving other constitutional violations as well. *Carey v. Piphus*, 435 U.S. at 266-67.

[6] Although the plaintiffs now argue that their success was sufficiently significant to warrant an award of attorney's fees, we seriously doubt that they would view an attorney's fee award of $1 as significant.

The award of $1 in nominal damages indeed is the type of "technical" success which this Court has suggested would not support an attorney's fee award. *Garland*, 489 U.S. at 792. *See also Huntley v. Community Sch. Bd. of Brooklyn, New York Dist. No. 14*, 579 F.2d 738 (2d Cir. 1978) (award of $100 in nominal damages is a " 'moral victory' of insufficient magnitude to warrant an award under § 1988").[7] *Cf. Carr v. City of Florence, Ala.*, 729 F. Supp. 783, 791 (N.D. Ala. 1990) ("This court cannot bring itself to characterize the $100.00 judgment in favor of one of twelve plaintiffs against one of eleven defendants as anything but 'purely technical' or 'de minimis.' "), *aff'd mem.*, 934 F.2d 1264 (11th Cir. 1991); *Spencer v. General Elec. Co.*, 894 F.2d 651, 662 (4th Cir. 1990) (dicta) (suggesting that if sexual harrassment case had not led to revision of company's anti-harassment policy, nominal damages award might be technical or de minimis victory unworthy of attorney's fees award under *Garland*). Farrar received nomi-

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[7] Although later Second Circuit panels have ruled that nominal damages alone can support an award of attorneys fees, *see Lyte v. Sara Lee Corp.*, 950 F.2d 101 (2d Cir. 1991) (Title VII); *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991) (§ 1988), they did so without addressing *Huntley*. Interestingly, Judge Miner of the Second Circuit, who wrote the opinions in both *Lyte* and *Ruggiero*, served on a panel in 1989 which denied attorney's fees under 17 U.S.C. § 505, which provides for attorney's fees to a prevailing party in a copyright infringement case. *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120 (2d Cir. 1989). Although Warner Bros. was awarded $100 in statutory damages, the panel, applying *Garland*, concluded that the award was not "sufficiently significant to mandate an award of attorney's fees." *Id.* at 1126. Neither *Lyte* nor *Ruggiero* distinguished *Warner Bros.*

nal damages only because of a technical requirement.[8] His success is thus "purely technical" *and* "de minimis" so that the Fifth Circuit's denial of fees is justified under *Garland*.[9]

Indeed, any other result in this case would be "legal nonsense." [10] It defies logic that a litigant who sought as huge a sum of money as $17,000,000—and no other relief—and was awarded only $1 would *himself* believe that he "prevailed." It is highly unlikely that when the jury's verdict was announced, the plaintiff was the party wearing the smile.

At the end of his rainbow, Farrar did not find any gold in the pot he sought. Under *Garland*, *Rhodes*, and *Hewitt*, "some relief on the merits" which "changes the legal relationship" is the touchstone for an award of attorney's fees. Since Farrar received none of these things, he has not met the statutory threshold and is not entitled to attorney's fees under Section 1988.

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[8] *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985).

[9] As the Fifth Circuit noted, several other circuits have held to the contrary. *Farrar*, 941 F.2d at 1316 and n.22. As the court correctly observed, however, these cases generally preceded or failed to address this Court's decisions on point. *Id.* at 1317.

[10] "Legal nonsense" is former Chief Justice Burger's description of a $245,456.25 fee award in a case where $33,350 in damages were recovered. *City of Riverside v. Rivera*, 477 U.S. 561, 587 (Burger, C.J., dissenting). In *Riverside*, the damages recovered were 13.6 percent of the fees sought. Here, the damages were only .00035 percent of the fees sought.

II. BASED ON THE RESULTS OBTAINED, THE MAXIMUM ATTORNEY'S FEE AWARDABLE FOR A NOMINAL DAMAGES RECOVERY IS LIKEWISE NOMINAL

Even if Farrar could be viewed as the "prevailing party" in this litigation, at which point calculation of a "reasonable" attorney's fee would be appropriate, any fee above a few dollars would be seriously disproportionate to the nominal damages awarded. To be commensurate with the results obtained, therefore, any attorney's fee awarded in this case should be as nominal as the damages award.

A. Under *Hensley*, the Results Obtained are "the Most Critical Factor" in Judging Whether an Award Is Reasonable

The results obtained from the litigation are relevant under Section 1988 not only when eligibility for an attorney's fee award is determined, but also in determining what award would be "reasonable." This Court's analysis in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), is equally applicable here. *Hensley* addressed the issue of whether a prevailing plaintiff who succeeds on less than all of his claims can recover attorney's fees on claims which were unsuccessful.

This Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." 461 U.S. at 440. Indeed, the Court called the level of success "the most critical factor." *Id.* at 436.

While noting that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate", *id.* at

433, this Court went on to explain that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* at 435. "If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonably hourly rate may be an excessive amount." *Id.* This is true regardless of how pure the motive or how virtuous the cause. "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill." *Id.* at 436. The outcome is what matters.

B. The Legislative History of Section 1988 Clarifies that Limited Success Limits the Amount of a Fee Award

The general rule in American courts is that litigants must pay their own counsel fees and that fee-shifting can be ordered only pursuant to specific statutory authority. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Thus, fee-shifting in the instant case, and in similar actions, is appropriate only where a fee award is authorized specifically by 42 US.C. § 1988.

The language of Section 1988 and its legislative history indicate that Congress intended it to have three principal elements. These are: (1) that awards may be made to the prevailing party; (2) that fee awards are not mandatory but are to be allowed at the discretion of the court; and (3) that awards are to be reasonable. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 6-8 (1976). In this statutory scheme, where Congress provided for fee awards only to successful

parties and specifically declined to make those awards mandatory, there is no basis for automatic hourly fee awards in cases that garner nominal damages and nothing more.

Congress believed that reasonable fee awards to successful prevailing parties would be sufficient encouragement to private attorneys general.[11] The statute supports no additional inducements. Indeed, the statutory scheme indicates that Congress was satisfied with the idea that the less-than-successful plaintiff would have to bear his own counsel fees. Congress evidently believed that the mere bringing of an action does not vindicate a public policy important enough to justify fee-shifting.

The legislative history reflects congressional recognition of the possibility that a private attorney general could bring a suit in good faith and yet be unsuccessful. The only protection Congress believed was necessary for this unsuccessful plaintiff was the assurance that he would not have to pay his *opponent's* counsel fees, unless it could be shown that the suit was clearly frivolous, vexatious, or brought for harassment purposes. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976). Nothing in the legislative history, however, indicates a Congressional concern that the prospect of having to pay all or part of their own counsel fees if less than completely successful would

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[11] As this Court explained in *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968), a plaintiff bringing suit for an injunction under Title II of the Civil Rights Act of 1964 (prohibiting race discrimination in public accommodations) does so not only for himself but also as a "private attorney general" acting in the public interest. Congress adopted the same concept when enacting § 1988. S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3 (1976).

deter plaintiffs from bringing meritorious civil rights actions.

Thus, even if a plaintiff who has been awarded only nominal damages could properly be deemed a prevailing party, there is no rule requiring that he receive an attorney's fee computed using hours expended at an hourly rate. As this Court ruled in *Hensley*, "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." 461 U.S. at 440. In other words, "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.*

C. It Would Be Unreasonable to Award More Than a Nominal Attorney's Fee Where Only Nominal Relief Was Obtained

Applying *Hensley*, the dissenting Justices in *City of Riverside v. Rivera*, 477 U.S. 561 (1986),[12] objected to the plurality's approval of an attorney's fee award of $245,456.25 in a case that netted $33,350 in compensatory and punitive damages. 477 U.S. at 588. Recalling *Hensley*'s mandate that counsel exercise "billing judgment" in requesting an attorney's fee award, the dissenting Justices contended that

[12] Chief Justice Burger filed a dissenting opinion in *Riverside*, and Justice Rehnquist filed a separate dissenting opinion in which Chief Justice Burger and Justices White and O'Connor joined. Justice Powell filed an opinion in which he noted that the fee award in that case "seems unreasonable" on its face, but ultimately concurred in the judgment on grounds that, as discussed below at p. 16, suggest he would not have voted to uphold the district court's grossly disproportional fee award in this case.

spending close to 2,000 hours on a case that recovered only $33,000 was "simply not a 'reasonable' expenditure of time." 477 U.S. at 595. The dissent observed:

> One may agree with all of the glowing rhetoric contained in the plurality's opinion about Congress' noble purpose in authorizing attorney's fees under § 1988 without concluding that Congress intended to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages.

Id.

The instant case presents a similar situation. In a case in which a jury could find no injury whatsoever, it is difficult to conclude that plaintiffs' counsel's expenditure of the time necessary to accumulate $280,000 in fees was reasonable. The logic of plaintiffs' argument is that they achieved an important victory. The absurdity of that proposition demonstrates the weakness of their arguments. As the Fifth Circuit noted, "This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more." *Farrar*, 941 F.2d at 1315.

Perhaps if plaintiffs had sought and obtained injunctive relief, or if the litigation had engendered a change in policy, the plaintiffs could at least make their argument here with a straight face. None of these things occurred. As the Fifth Circuit pointed out, "The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. 'That is not the stuff of which legal victories are made.'" 941 F.2d at 1315 (quoting *Hewitt*, 482 U.S. at 760).

Even Justice Powell, who concurred only in the judgment in *Riverside*, noted that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." 477 U.S. at 585 (Powell, J., concurring in result). Justice Powell continued, "In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered." *Id.* (noting that the *Riverside* verdict "may well have served a public interest" based on allegations that the police misconduct at issue reflected hostility to a particular ethnic community as a whole). Foreshadowing the instant case, however, Justice Powell noted that "[i]t probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case." *Id.* at 586 n.3.

Indeed, it is difficult to see what public interest, if any, was served by this lawsuit. Petitioners can point to no concrete benefit to themselves, let alone to the public at large, as a result of this lawsuit. They quote the district court as saying that "[a]warding attorney's fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions . . . [T]he cumulative effect of meritorious civil rights litigation eventually deters impermissible conduct by government officers. . . ." Brief for Petitioners at 19 (quoting unpublished district court order awarding attorney's fees). This is speculation at best. It is highly unlikely that the $1 award in this case inspired much self-analysis among Texas state officials or anyone else. It is equally unlikely that this—rather than the recovery of money damages—was Farrar's motivation in bringing suit since Farrar did not even request relief designed to change any official behavior. Finally, it is the relief awarded, not the attorney's fees, that must be the catalyst for change.

Accordingly, the attorney's fees award of $280,000 has no proportionality whatsoever to the relief actually obtained in this case. Under the dictates of this Court in *Hensley*, and the considerations expressed by the dissenting Justices and Justice Powell in *Riverside*, even if Petitioners could be said to have prevailed in the litigation, such a disparate award is unwarranted. To reflect accurately the principles underlying Section 1988, no more than a nominal attorney's fee, corresponding to the nominal damages, can be justified.

III. PUBLIC POLICY CONSIDERATIONS FAVOR AN INTERPRETATION OF SECTION 1988 THAT DOES NOT AWARD COUNSEL FEES EXCEPT FOR LEGAL SERVICES REASONABLY SUPPORTIVE OF PLAINTIFF'S SUCCESS AS A PRIVATE ATTORNEY GENERAL. TO MEET ITS GOALS, SECTION 1988 SHOULD AT MOST OFFER FEES COMMENSURATE WITH SUCCESS

The fee-shifting provision in Section 1988 embodies a recognition that fee awards will act as an inducement to the filing of lawsuits. In practical terms, it is inevitable that such a fee-shifting statute will serve to encourage whatever types of lawsuits it rewards. If only private relief is sought and little is obtained, with no real hope of a change in circum-

stances otherwise, and yet fees are shifted to the defendant, the result "turns § 1988 into a relief Act for lawyers." *Riverside*, 477 U.S. at 588 (Rehnquist, J., dissenting). There is a distinct danger in such cases that awards of fees based on the full scope of litigation that ultimately failed in its intended purpose may result in windfalls to plaintiffs' attorneys and may encourage excessive litigation of questionable or necessary claims. It was to avoid this result that this Court held in *Hensley* that the fee award for a partially successful plaintiff must be "reasonable in relation to the results obtained," 461 U.S. at 440, and that "the most critical factor" in determining the amount of the award "is the degree of success obtained." *Id.* at 436. This emphasis on the degree of the plaintiff's success ensures that attorney's fees will be awarded only to the extent that the plaintiff has vindicated some important public policy and thus has fulfilled the purpose of Section 1988.

As discussed above, this Court observed in *Hensley* that "[a] reduced fee award is appropriate if the relief, however significant, is limited *in comparison to the scope of the litigation as a whole.*" *Id.* at 440 (emphasis added). In cases such as this, where only damages are involved, EEAC submits that the adoption of a requirement that fees bear a reasonable relationship to the amount of damages recovered would better ensure the relationship between the fee award and the plaintiff's degree of success that *Hensley* recognized as being necessary to fulfill the purposes of Section 1988.

In *Christiansburg Garment Co.*, this Court suggested that awarding fees only to *prevailing* plaintiffs would not in itself be an incentive for plaintiffs to bring claims that have little chance of success. 434

U.S. at 422. For the plaintiff who is deemed "prevailing" even though he or she has achieved limited success, however, this will be true only if there is a requirement of some reasonable degree of proportionality between the amount of the fee award and the relief obtained.

A plaintiff's attorney knows that succeeding on any significant civil rights claim and achieving some of the benefit sought will qualify the plaintiff as a "prevailing party" and in most cases will entitle the plaintiff to some amount of attorney's fees. *Garland*, 489 U.S. at 789. However, if there is a possibility that the court may award fees even for cases whose sole result is a $1 nominal damages award, there will be a strong incentive for the attorney to bring such cases despite the possibility that they will not result in any material success for the client. The attorney may be willing to gamble that a jury will bring in at least a favorable liability finding, and that the trial court will award fees based on all of the time spent on the case. That is precisely what the district court in the instant case did, awarding petitioner's attorneys a substantial windfall for their nominal success. A requirement that the amount of the fee award must bear some reasonable relationship to the plaintiff's degree of success would remove any incentive to bring lawsuits where no public interest is at stake and no harm occurred.

In the area of employment discrimination litigation, it is standard practice for plaintiffs to file actions claiming monetary damages under 42 U.S.C. § 1981.[13] Believing that they have been discriminated

[13] With the passage of the Civil Rights Act of 1991, Pub. L. No. 101-166 (1991), Title VII claimants are now be able to sue for compensatory and punitive damages.

against in employment, they often bring suit to challenge what at best is an isolated incident rather than an indication of a pattern or practice of widespread discrimination. Rather than trying to improve conditions for others, they simply seek retribution for what they perceive to be an individual wrong.

While such a suit is permitted under the law, it does not necessarily make the plaintiff a "private attorney general" acting in the public interest. If in such cases, plaintiffs' attorneys know that the only result necessary to cover their fee is a nominal damages award, it may be expected that they will "roll the dice" and pursue these claims regardless of the prospect for success, rather than making an initial reasoned determination of the likelihood of success on the merits. By threatening to litigate such claims, the plaintiff can exert pressure on the employer either to accept an inflated settlement demand or to litigate the matter at significant expense.

Generally, public policy does not favor coerced settlements or unnecessary litigation. The area of civil rights is no exception. Indeed, under Title VII of the Civil Rights Act of 1964, the public policy favoring voluntary settlement of civil rights matters through comprehensive negotiation and conciliation is reflected in the statutory scheme.[14] An interpretation of the

[14] 42 U.S.C. § 2000e-5(k). *See Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for voluntary settlement of employment discrimination claims."), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The counsel fees provision in Title VII is virtually identical to the provision in Section 1988 at issue in this case. The legislative history of the Title VII fees provision is quite brief, but it does include an explanation by Senator Humphrey that the purpose of the provision was to "make it easier for a plaintiff of limited means to bring a meritorious suit." 110 Cong. Rec. 12724 (June 4, 1964) (statement of Sen. Humphrey).

counsel fees provision which awards fees only for services reasonably reflective of plaintiffs' success fully satisfies the public policy of encouraging meritorious claims by victims of discrimination. And it does so without offering an inducement for expanded litigation that would interfere with the desirable process of settlement negotiations.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the Fifth Circuit decision be affirmed.

Respectfully submitted,

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June 15, 1992

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No. 91-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DALE FARRAR, *et al.*,
Petitioners,

v.

WILLIAM P. HOBBY, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff who recovers only a nominal damage award in an action in which the sole relief sought is $17 million in monetary damages is a "prevailing party" entitled to attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The decision in this case will have a significant impact on the financial exposure of city and state governments and officials resulting from litigation under the civil rights

laws. *Amici* submit that an award of attorney's fees under Section 1988 to a plaintiff who recovers none of the relief that he sought—merely because of an abstract finding that plaintiff was deprived of an unspecified civil right—is contrary to Congress' intent and fundamentally unfair. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. In the early 1970s, Joseph D. Farrar and his son, Dale L. Farrar, owned and operated Artesia Hall, a school in Liberty County, Texas for the care of delinquent, handicapped, and disturbed teenage children. Pet. App. A4. After the death of an Artesia Hall student in 1973, a Liberty County grand jury returned a murder indictment against Joseph Farrar, charging him with willfully failing to administer proper medical treatment to the student and failing timely to provide for her hospitalization. *Id.* at A31. Upon learning of the situation, respondent William Hobby, then Lieutenant Governor of Texas, publicly demanded an investigation of Artesia Hall. *Id.* at A32. The State of Texas thereafter obtained an injunction that required the closing of Artesia Hall. *Id.*

In June 1975, after the murder indictment against Joseph Farrar had been dismissed, the Farrars filed this action under 42 U.S.C. § 1983 against Hobby, two elected officials of Liberty County, a judge, and three state employees. Pet. App. A32. The Farrars claimed that Hobby and the other defendants had violated their civil rights by, among other things, malicious prosecution aimed at closing the school, and had conspired to deprive them of their civil rights, livelihoods, and professional reputations. *Id.*

Initially, the Farrars sought both monetary damages and injunctive relief. *Id.*; Resp. Br. Opp. 1. They later

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

amended their complaint to omit the prayer for injunctive relief. J.A. at 33. The amended complaint states that their suit was brought

> for money damages only. No injunctive relief is now herein sought, nor would such now serve any useful purpose.

Id. In this complaint, the Farrars increased their prayer for monetary relief from $2.7 million to $17 million. *Id.* at 33; Pet. App. A32.

In 1983, the case was tried to a jury. Pet. App. A15. Although the Farrars sought $17,000,000 in damages, "the jury found no damages" and did not award the Farrars anything. Pet. App. A31. The jury did find that respondent Hobby had "committed an act or acts under color of state law that deprived Plaintiff Joseph David Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas." Resp. App. A3. It also found, however, that the act or acts of respondent Hobby were not a proximate cause of any damages to the Farrars. *Id.* at A1-A4. Based upon these findings, the district court ordered "that plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs." *Id.* at A5-A6.[2]

The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. A2-A11. It rejected the Farrars' challenge to the various jury instructions made by the district court. *Id.* at A4-A9. It also held, however, that, "[b]ecause the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not

[2] The record does not identify the civil right found to have been violated by Hobby. As the district court noted, "the jury instructions made it difficult to discern exactly what the jury found." Pet. App. A15.

to do so when the Farrars so moved in their motion for a new trial." *Id.* at A10. The court of appeals therefore remanded the case to the district court "for the entry of nominal damages against [Hobby]." *Id.* at A33.

2. On remand, the district court entered a judgment for nominal damages. Pet. App. A31. Then, after reviewing this Court's analysis of the "prevailing party" standard in *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989), the court ruled that "[t]he award of nominal damages meets the test announced in *Garland*." Pet. App. A19. The district court thereupon ordered respondent Hobby to pay the Farrars $280,000.00 in attorney's fees, $27,932.00 in costs, and $9,730.00 in prejudgment interest. *Id.* at A12.

3. On appeal, the Fifth Circuit reversed. Pet. App. A30-A45. The court reviewed the relevant authorities from this Court and concluded that, "to qualify as a prevailing party, a plaintiff must show that he won at least some relief from the defendant, that the outcome of the suit changed the legal relationship between the parties, and that the plaintiff's success was not a *de minimis* or technical victory." *Id.* at A38. The court of appeals held that "the Farrars were *not* prevailing parties for the purposes of § 1988." *Id.* It based this holding on the fact that the Farrars had been awarded none of the relief they sought in their lawsuit; as the court explained,

> The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing.

Id.

SUMMARY OF ARGUMENT

Congress enacted Section 1988 in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that attorney's fees may not be shifted without express statutory authorization. In enacting Section 1988, Congress intended to provide such express authorization in civil rights cases and to promote vigorous enforcement of modern civil rights legislation. At the same time, however, Congress was concerned that Section 1988 not be treated as a "food-stamp" bill for lawyers, or be applied so as to encourage "trivial" suits or to create "windfalls" for attorneys. To accomplish these competing goals, Congress chose the "prevailing party" standard.

The Court has long recognized that the "prevailing party" standard is a "permissive and discretionary" one that is not subject to a mechanical construction and that must be interpreted in keeping with Section 1988's competing policies. Thus, the Court has held that a prevailing defendant is not entitled to a fee award unless the plaintiff's action is "frivolous, unreasonable, or without foundation." Out of respect for the statutory language and the countervailing policy concerns of Congress, the Court has also held, however, that a mere favorable finding of fact or the entry of judgment in a plaintiff's favor is not a sufficient basis for attorney's fee shifting for the plaintiff. Rather, the Court has held that achievement of a material aspect of the relief sought in the complaint is necessary for an award of fees to a prevailing plaintiff; achievement of a "technical" or "*de minimis*" success is not enough to establish "prevailing party" status.

The court below correctly concluded that a civil rights plaintiff who claims entitlement to extensive monetary relief but receives only a nominal damage award has not crossed the statutory threshold for a fee award identified in this Court's decisions. That conclusion finds rich support in analogous cost and fee-shifting laws and practices.

Despite their willingness to allow fee-shifting in all civil cases, the English developed a rule disallowing all costs and fees to plaintiffs who recover only nominal or trivial relief on claims for extensive monetary relief. This historic practice has been followed in the United States with respect to cost-shifting provisions such as Rule 54(d) of the Federal Rules of Civil Procedure. The historic practice has also been followed in a variety of contemporary attorney's fees statutes.

There is nothing in the language or legislative history of Section 1988 to suggest that Congress intended to depart from this historic and widespread practice of denying costs and attorney's fees to nominal or pyrrhic victors. On the contrary, at the time Section 1988 was enacted, it was well established that a "trivial success on the merits" was not sufficient to support the shifting of attorney's fees. Moreover, the legislative history of Section 1988 indicates that Congress understood itself only to be authorizing courts to recommence the discretionary fee-shifting practices in which they had engaged prior to the *Alyeska* decision, and those practices included denying fees to nominal or pyrrhic victors. Indeed, the legislative history explicitly states that Congress did not want to encourage "trivial" lawsuits or create "windfalls" for attorneys, which is precisely the rationale for the historic practice that denies shifting of costs and fees to nominal or pyrrhic victors.

Contrary to the argument of petitioners and the American Bar Association ("ABA"), plaintiffs who obtain enforceable civil rights judgments are not necessarily "prevailing parties" within the meaning of Section 1988. This Court's decisions require that, in addition, such a plaintiff recover some material aspect of the relief sought in the complaint.

The decision in *Carey v. Piphus*, 435 U.S. 247 (1978), does not hold that nominal damage awards are always non-*de minimis* remedies. *Carey* holds only that, where

the violation of a constitutional right by its nature does not cause a compensable injury, nominal damages must be awarded in order that the right may be judicially established and vindicated. *Carey* does not even begin to address the question whether nominal damage awards may constitute *de minimis* relief in cases where extensive monetary damages were sought. Indeed, to have held that nominal damage awards in such cases may not be treated as *de minimis* relief would have contradicted centuries of practice. Since *Carey* purports to embrace the common law, it cannot reasonably be read to support such a contradiction.

Petitioners and their *amicus* object that, under this Court's decisions, the relative success of the plaintiff is relevant only to the amount of the fee awarded. But the Court's cases make it plain that the determination whether a "material alteration" has occurred in the relationship between a plaintiff and a defendant requires an evaluation of the "significance" of the plaintiff's success "in the context of th[e] litigation" as a whole.

Contrary to the argument of petitioners and the ABA, the "*de minimis* success" test applied by the court below does not focus on the mental state of the parties or promise to mire the district courts in unmanageable inquiries. Rather, the test focuses on the relief requested in the plaintiff's complaint and simply requires the district court to determine whether the plaintiff has obtained a material aspect of it. As the ABA concedes, this is an inquiry that this Court has long entrusted to the district courts.

Finally, there is no basis for the suggestion that denying "prevailing party" status to plaintiffs who receive only nominal damages in cases seeking extensive monetary relief is inconsistent with congressional intent. Doing so will not discourage lawyers from representing claimants in cases in which little or no damages are perceived

as recoverable. Cases in which lawyers have satisfied themselves that there is a reasonable basis for seeking extensive monetary relief are by definition not cases in which little or no damages are perceived as potentially recoverable.

ARGUMENT

A PLAINTIFF WHO RECOVERS ONLY A NOMINAL DAMAGE AWARD IN AN ACTION IN WHICH THE SOLE RELIEF SOUGHT IS $17 MILLION IN MONETARY RELIEF IS NOT A "PREVAILING PARTY" ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C. § 1988

Petitioners' amended complaint makes it clear that they sought "money damages only" and that injunctive relief "would not serve any . . . purpose" in this case. J.A. 25. The jury found that petitioners were not entitled to any of the monetary relief sought in the complaint. Resp. App. A3-A4. The court of appeals ruled that petitioners were entitled to a nominal damage award in recognition of the constitutional infringement that the jury nonetheless found to have occurred. Pet. App. A10. But the court also concluded that petitioners' victory was sufficiently pyrrhic to prevent them from being considered "prevailing parties" entitled to attorney's fees under 42 U.S.C. § 1988. *Id.* at A38-A39. As demonstrated below, this conclusion is supported by the decisions of this Court interpreting 42 U.S.C. § 1988, centuries of practice and case law under analogous cost and fee-shifting rules, and important considerations of policy that were of concern to Congress when it enacted Section 1988.

A. A Plaintiff Must Recover Some Material Aspect Of The Relief Sought In The Complaint To Be A "Prevailing Party" Entitled To Attorney's Fees Under 42 U.S.C. § 1988

Section 1988 on its face provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, and 1986 of this title . . ., the court, in its

discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The pertinent interpretive materials establish that a plaintiff is a "prevailing party" within the meaning of Section 1988 only if the plaintiff receives some material aspect of the relief sought in the complaint.

1. As this Court has repeatedly recognized, Section 1988 was enacted in 1976 in response to the Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). In *Alyeska*, the Court held that, in the absence of specific statutory authorization, tradition and historical practice in America require that each party bear responsibility for its own attorney's fees without regard to success in the suit. 421 U.S. at 271. In introducing Section 1988, Senator Tunney thus stated that

> [t]he Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts are to continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in title II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

121 Cong. Rec. 26806 (1975); *see also* S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976).

In so authorizing fee-shifting in civil rights cases, Congress determined that "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proven an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, *supra* at 2. Congress found that "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." *Id.* Congress further found that such cases often "do not provide the prevailing plaintiff

with a large recovery from which he can pay his lawyer." 122 Cong. Rec. 33314 (1976) (statement of Sen. Kennedy). Congress thus viewed fee-shifting as necessary for "vigorous enforcement of modern civil rights legislation . . . ." S. Rep. 1011, *supra* at 4.

At the same time, however, Congress was concerned that Section 1988 not be treated as "a food-stamp bill for lawyers." 122 Cong. Rec. 35127 (1976) (statement of Rep. Jordan). The bill was "not intended to encourage groundless or frivolous litigation." *Id.* at 35124 (statement of Rep. Drinan). Nor was it intended to create "windfalls" for attorneys. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976); 122 Cong. Rec. 31474 (1976) (statement of Sen. Allen). On the contrary, Congress wanted only to compensate those parties who were successful in civil rights litigation, H.R. Rep. No. 1558, *supra* at 9, and at the same time to deter "trivial and specious law suits." *See* 122 Cong. Rec. 31792 (1976) (statement of Sen. Helms).

2. To accomplish these competing goals, Congress chose the "permissive and discretionary" prevailing party language. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). As this Court has recognized, this language "does not even invite, let alone require, . . . a mechanical construction." *Id.* at 418. Indeed, the Court has stated that "[t]he terms of [the statute] provide no indication whatever of the circumstances under which either a plaintiff *or* a defendant should be entitled to attorneys' fees." *Id.* (emphasis in original). Rather, as the Court has recognized, the statutory language instructs that "equitable considerations" and historical practice should inform who shall receive awards of attorney's fees. *Id.* at 419; *accord* H.R. Rep. No. 1558, *supra* at 8 (statute leaves "the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fees provisions"); 122 Cong. Rec. 35128

(1976) (statement of Rep. Jordan) ("have faith in your judges").

Pursuant to this statutory instruction, the Court has held that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. at 429 (citations omitted). It has also held that a plaintiff may "prevail" through a settlement and need not obtain formal judicial relief in order to receive an award of attorney's fees. *Maher v. Gagne*, 448 U.S. 122, 129-30 (1980). And it has held that, in contrast to the generous treatment of prevailing plaintiffs but in keeping with the multifarious policies of Section 1988, a prevailing defendant may recover an award of fees only where a plaintiff's action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 420-22.

On the other hand, out of respect for the statutory language and the countervailing policy concerns of Congress, the Court has also held that success on a significant issue in the litigation and achievement of a material aspect of the relief sought in the complaint are necessary for an award of fees to a plaintiff. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). Thus, in *Hanrahan v. Hampton*, 446 U.S. 754, 756-59 (1980), the Court held a favorable interlocutory ruling on appeal insufficient as a basis for awarding attorney's fees because such a ruling itself affords no relief to the plaintiff. Moreover, in *Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987), the Court held that a plaintiff who has proven unconstitutional conduct nevertheless does not "prevail" within the meaning of Section 1988 when the defendant's qualified immunity precludes an award of damages to the plaintiff, reasoning that "the moral satisfaction of knowing that a federal court concluded that [plaintiff's] rights ha[ve] been violated" is not enough under the statute. *Id.* at 761-62. Similarly, in *Rhodes*

v. Stewart, 488 U.S. 1, 3-4 (1988), the Court held that, where a case has become moot before judgment, even the entry of a declaratory judgment is not sufficient to establish "prevailing party" status, since a judgment "will constitute relief, for purposes of § 1988 if, and only if, it affects the behavior of the defendant toward the plaintiff."

3. The Court summarized this understanding of the law in *Garland*. There, in "decid[ing] the proper standard for determining whether a party has 'prevailed' " for Section 1988 purposes, the Court unanimously held that a plaintiff establishes "prevailing party" status only "[i]f the plaintiff has succeeded on 'any significant issue in the litigation which achieved some of the benefit the parties sought in bringing suit.' " 489 U.S. at 791-92 (citation omitted).

In explaining this standard, the Court noted two important points which the lower courts must consider. *Id.* First, the Court ruled that, as a "floor" or "absolute limitation," the plaintiff must "at a minimum . . . be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792. "Beyond this," however, the Court ruled that "a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status." *Id.* Hence, plaintiffs are deemed prevailing parties only when they have "prevailed on a significant issue in the litigation and have obtained some of the relief they sought." *Id.* at 793.

In *Garland*, the Court agreed that the plaintiffs' success in "materially alter[ing] the school district's policy" justified their being deemed to be prevailing parties. 489 U.S. at 793. However, the Court expressly noted that, had the *Garland* plaintiffs succeeded only on one of their constitutional claims characterized by the district court "as 'of minor significance,' " they would not have been "prevailing parties." *Id.* at 792. In the Court's judgment, such a minor success would be too "technical" or "*de minimis*" to justify "prevailing party" status. *Id.*[3]

B. A Plaintiff Who Seeks Extensive Monetary Relief But Receives Only A Nominal Damage Award Has Not Recovered A Material Aspect Of The Relief Sought In The Complaint

The court below concluded that a civil rights plaintiff who seeks extensive monetary relief but receives only a nominal damage award has not crossed the statutory threshold for a fee award identified in *Garland*. Stated differently, the court below concluded that a plaintiff who seeks extensive monetary relief but receives only a nominal damage award has not, as required by this Court's cases, recovered a material aspect of the relief sought in the complaint. This conclusion finds rich support in analogous cost and attorney's fee-shifting laws and traditions, and is necessary to effectuate the intentions of the Congress that enacted Section 1988.

1. In contrast to the prevailing practice in America, English courts have historically required the losing party in litigation to pay the victor's attorney's fees and costs. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967); Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation As An Element of Damages*, 15 Minn. L. Rev. 619 (1931). However, in 1670, the English by statute developed a rule—sometimes called the "forty shilling" rule—which provided that costs and attorney's fees would not be shifted to the losing party where the plaintiff recovered "only trivial dam-

[3] The *Garland* plaintiffs prevailed in the district court on their claim that "the requirement that non-school hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague." 489 U.S. at 792. The *Garland* Court emphasized, however, that "[i]f this had been [plaintiffs'] only success in the litigation, we think it clear that this alone would not have rendered them 'prevailing parties' within the meaning of § 1988." *Id.*

ages." *Id.* at 619. English courts applied this rule to situations where only "small judgments [were] awarded upon large claims," such as in "many types of cases where a plaintiff succeeds in recovering merely nominal damages." Charles T. McCormick, *Handbook on the Law of Damages* at 94. The purpose of the rule was "to discourage plaintiffs from cumbering the courts with insubstantial and trivial claims . . . ." *Id. See also* 3 William Blackstone, *Commentaries* *400 (recognizing that the rule serves to "prevent . . . trifling and malicious actions . . . .").

While courts and legislatures in America generally declined to follow the English approach of shifting attorney's fees to the losing party, they embraced early on the rule that the prevailing party should recover "costs" from the losing adversary. McCormick, 15 Minn. L. Rev. at 620. However, as in England, the federal courts and at least two-thirds of the States refused to authorize such cost-shifting where a plaintiff had recovered only trivial damages. McCormick, *Handbook on the Law of Damages* at 94-95 (surveying the law of American jurisdictions). Thus, Dean McCormick was able to write in 1935 that "the plaintiff to-day can by no means invariably rely upon a judgment for nominal damages as a 'peg' for costs." *Id.* at 95.

In more modern times, courts applying Rule 54(d) of the Federal Rules of Civil Procedure have similarly declined to award costs to the victor in litigation "where the judgment recovered was insignificant in comparison to the amount actually sought." *Esso Standard v. S.S. Wisconsin*, 54 F.R.D. 26, 27 (S.D. Tex. 1971); *see also Howell Petroleum Corp. v. Samson Resources Co.*, 903 F.2d 778, 783 (10th Cir. 1990); *Lewis v. Pennington*, 400 F.2d 806, 819 (6th Cir.), *cert. denied sub nom. Pennington v. United Mine Workers*, 393 U.S. 983 (1968). This is consistent with the Rules' intention to retain the practice of denying costs to plaintiffs recovering less than $500. *See* 28

U.S.C. § 815 (repealed); *see also* Fed. R. Civ. P. 54 advisory committee note. Indeed, courts have even cited *Garland* as support for denying costs where a "recovery was 'nominal' when compared to the claims asserted by [the plaintiff]." *Northbrook Excess & Surplus Ins. Co. v. Proctor & Gamble*, 924 F.2d 633, 641-42 & n.11 (7th Cir. 1991).

This historic practice of denying "prevailing party" status to plaintiffs who obtain only nominal or pyrrhic victories has also been applied in a variety of contemporary attorney's fee-shifting statutes that limit awards to "prevailing parties." *See, e.g., Overland Dev. Co. v. Marston Slopes Dev. Co.*, 773 P.2d 1112, 1115-16 (Colo. Ct. App. 1989) (Colorado law); *Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So. 2d 266, 270 (Fla. Dist. Ct. App. 1985) (Florida law); *Jet Line Serv. v. American Employers Ins. Co.*, 537 N.E.2d 107, 115 (Mass. 1989) (Massachusetts law); *Dresselhouse v. Chrysler Corp.*, 442 N.W.2d 705, 711 (Mich. Ct. App. 1989) (Michigan law); *International Indus. v. United Mortgage Co.*, 606 P.2d 163, 167 (Nev. 1980) (Nevada law); *see generally* McCormick, *Handbook on Law of Damages* at 94 n.51 (cataloguing laws in existence in 1935); *cf.* Tex. R. Civ. P. 137 (denying cost awards in tort cases where less than $20 is recovered). As one court stated in denying attorney's fees to a litigant who had sought $175,000 but recovered only a nominal damage award, "the mere judicial declaration that one of the plaintiff's legal assertions is correct does not mean that he has prevailed in the litigation, unless some benefit flows, or may be anticipated to flow from that declaration." *Overland Dev. Co. v. Marston Slopes Dev. Co.*, 773 P.2d at 1115-16.

2. There is nothing in the language or legislative history of Section 1988 that indicates that Congress intended to depart from this historic practice of denying costs and attorney's fees to nominal or pyrrhic victors. The absence of such evidence should itself be sufficient to sustain such a historic and prevailing practice. *See Evans v. United*

States, No. 90-6105, slip op. at 4 (U.S. May 26, 1992); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980). But there is also affirmative evidence that Congress intended to continue this practice under Section 1988.

First, the requirement in Section 1988 that the plaintiff be a "prevailing party" is inconsistent with awarding attorney's fees to nominal or pyrrhic victors. As this Court has noted in an analogous context, at the time Section 1988 was enacted, the term "prevailing party" "was thought not to extend to parties who prevailed only in part" and was understood to be more exacting than standards—such as "partially prevailing party"—used in other fee-shifting statutes. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 689 (1983). Indeed, at the time, it was clear that a "trivial success on the merits" was not sufficient to support the shifting of attorney's fees. *Id.* at 689 n.9. By definition, of course, a nominal damage award on a prayer for extensive monetary relief is such a "trivial" success on the merits. *See Chesapeake & Potomac Tel. Co. v. Clay*, 194 F.2d 888, 890 (D.C. Cir. 1952) ("The term nominal damages means a trivial sum—usually one cent or one dollar—awarded to a plaintiff whose legal right has been technically violated but who has proved no real damage."); McCormick, *Handbook on the Law of Damages* at 96. Congress' understanding of the existing state of the law controls "whether Congress correctly perceived the then state of the law" or not. *Brown v. GSA*, 425 U.S. 820, 828 (1976).

Second, as noted above, the legislative history of Section 1988 indicates that Congress understood itself only to be authorizing the courts to recommence the fee-shifting practices in which they had engaged in civil rights cases prior to this Court's *Alyeska* decision. *See* S. Rep. No. 1011, *supra*, at 4, 6; *see also* 122 Cong. Rec. 35117 (1976) (remarks of Rep. Railsback). Prior to *Alyeska*, courts had been following the tradition of denying fee requests where the amount recovered was insignificant or

de minimis in relation to the amount being sought. *See, e.g., Tatum v. Morton*, 386 F. Supp. 1308, 1318 (D.D.C. 1974); *Evans v. Sheraton Park Hotel*, 4 Fair Empl. Prac. Cas. (BNA) 1265, 1266 (D.D.C. 1972). Interpreting the statute to override this tradition would thus be inconsistent with Congress' stated intention of reauthorizing pre-*Alyeska* judicial fee-shifting practices.

Finally, as also noted above, the legislative history makes it plain that Congress intended for Section 1988 merely to compensate plaintiffs who had successfully vindicated significant civil rights claims; Congress did not intend to encourage "trivial" lawsuits or produce "windfalls" for attorneys. *See* 122 Cong. Rec. 31792 (1976) (statement of Sen. Helms); H.R. Rep. No. 1558, *supra* at 9. The traditional rule against cost and fee-shifting to nominal or pyrrhic victors is grounded in similar concerns. *See* McCormick, *Handbook on the Law of Damages* at 94. Thus, interpreting Section 1988 to authorize fee-shifting to nominal or pyrrhic victors would be at odds with Congress' stated intentions; "a windfall can be provided by awarding a fee where none is due as well as by overpayment where a fee is due." *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1037 (8th Cir. 1984) (en banc) (Henley, J., dissenting).[4]

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[4] For such reasons, many courts have correctly joined in the Fifth Circuit's view that Section 1988 does not authorize shifting of attorney's fees where the plaintiff has obtained only *de minimis* success in relation to the relief sought in the complaint. *See, e.g., Warren v. Fanning*, 950 F.2d 1370, 1375 (8th Cir. 1991); *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d 718, 724 n.4 (2d Cir. 1984); *Ohland v. City of Montpelier*, 467 F. Supp. 324, 349-50 (D. Vt. 1979); *see also Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985) (equating the entitlement standard under the Equal Access to Justice Act to Section 1988 and concluding that a plaintiff must recover "a substantial part of what he sought"). Indeed, many courts have joined the court below in holding that fee-shifting is not appropriate where a plaintiff obtains only nominal damages on a prayer for extensive monetary relief. *See, e.g., Lawrence v. Hinton*, 20 Fed. R. Serv. 3d

C. The Arguments Advanced In Favor Of According "Prevailing Party" Status To Plaintiffs Receiving Only Nominal Damages On Prayers For Extensive Monetary Relief Are Unsound

Petitioners and the American Bar Association ("ABA") advance a series of arguments concerning why plaintiffs who obtain nominal damage awards on prayers for extensive monetary relief should be deemed "prevailing parties." But these arguments are unsound.

1. Petitioners and the ABA (Pet. Br. 9-10, ABA Br. 8-11) first suggest that a plaintiff becomes a "prevailing party" simply by obtaining any enforceable civil rights judgment against the defendant. But the Court's decisions in *Hewitt* and *Rhodes* make it plain that the determination that the plaintiff's civil rights have been violated is not enough to establish "prevailing party" status. *See Hewitt v. Helms*, 482 U.S. at 761; *Rhodes v. Stewart*, 488 U.S. at 4. Moreover, the Court's decision in *Garland* makes it clear that an enforceable judgment is also not by itself sufficient to establish "prevailing party" status; *Garland* expressly holds that, to achieve "prevailing party" status, the plaintiff must achieve more than a *de minimis* or technical success in relation to the total relief sought in the lawsuit. *See* 489 U.S. at 792.

2. Petitioners and the ABA (Pet. Br. 8-10, 13-14; ABA Br. 6-8) next argue that this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978), holds that nominal damage awards are always non-*de minimis* remedies in constitutional cases. *Carey*, however, holds only that,

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934 (4th Cir., July 12, 1991), *aff'g* 131 F.R.D. 659, 661-63 (M.D.N.C. 1990); *Carr v. City of Florence*, 729 F. Supp. 783, 791 (N.D. Ala. 1990), *aff'd without op.*, 934 F.2d 1264 (11th Cir. 1991); *see also Lewis v. Kendrick*, 944 F.2d 949, 955-56 (1st Cir. 1991) (denying fees where plaintiffs requested 140 times the amount recovered); *Moran v. Pima County*, 700 P.2d 881, 882-83 (Ariz. Ct. App.), *cert. denied*, 474 U.S. 989 (1985). *Cf. Northbrook Excess and Surplus Ins. v. Proctor & Gamble*, 924 F.2d at 641-42 & n.11.

where the violation of a constitutional right by its nature does not cause a compensable injury, nominal damages must be awarded in order that the right may be judicially established and vindicated. *See id.* at 266. *Carey* does not even begin to address the question whether nominal damage awards are *de minimis* remedies or not, much less hold that they never are. Indeed, as noted above (at 13-14, *supra*), to have so held would have been inconsistent with centuries of practice of denying cost and attorney's fee-shifting in many types of nominal damage award cases.

Carey cannot properly be read as petitioners urge. The Court in *Carey* embraced common-law principles in holding that plaintiffs in civil rights actions may not recover compensatory damages if they are unable to prove that they have been harmed by the unconstitutional conduct in issue. *See* 435 U.S. at 261-62. Likewise, the Court in *Carey* embraced common-law principles in holding that nominal damages should be awarded in cases where rights —such as procedural due process—are actionable even in the absence of actual injury. *Id.* at 266-67. Such a decision embracing common-law principles cannot reasonably be read simultaneously to reject other historic practices.

Contrary to the argument of petitioners and the ABA, neither *Carey* nor the common law hold that nominal damages are awarded as a means of compensating the plaintiff. *Carey* holds only that nominal damages should be awarded to recognize some constitutional rights. *See* 435 U.S. at 266. And the common law expressly holds that nominal damages are awarded "merely as a recognition of some breach of duty owed by defendant to plaintiff and not as a measure of recompense for loss or detriment sustained. . . . [As such, they] are in no sense compensatory, but merely symbolic." McCormick, *Handbook of the Law of Damages* at 85; *see also* Dan B. Dobbs, *Handbook on the Law of Remedies* at 191 (1973) (Nominal damages "are not aimed at compensation for harm done by the defendant's actionable conduct. In this sense they do

not represent 'damages' at all . . . [and are] not compensatory even in a limited sense.").

That a nominal damage award is not a means of compensating a plaintiff does not, of course, mean that such awards are necessarily insufficient ever to support "prevailing party" status. But where, as here, plaintiffs sought extensive monetary relief as compensation and failed to obtain any of it, they cannot properly be said to have "obtained some of the relief sought." *Garland*, 489 U.S. at 791. Indeed, to hold that a nominal damages award in a Section 1988 case is never a *de minimis* victory would render "the concept of de minimis relief meaningless. *Every* nominal damages award has as its basis a finding of liability, but obviously many such victories are Pyrrhic ones." *Lawrence v. Hinton*, 20 Fed. R. Serv. 3d at 937 (emphasis in original). As the Court of Appeals for the District of Columbia Circuit has stated, when "the net result achieved is so far from the position originally propounded . . . it would be stretching the imagination to consider the result a 'victory' in the sense of vindicating the rights of the fee claimants." *Commissioners Court of Medina County, Tex. v. United States*, 683 F.2d 435, 442-43 (D.C. Cir. 1982).

3. Petitioners and the ABA object (Pet. Br. 10-14; ABA Br. 2-4, 17-19) that, under this Court's decision in *Garland*, the relative success of the plaintiff is relevant only to the reasonableness of the amount of the fee awarded. But petitioners and the ABA misunderstand the Court's decision in *Garland*.

Garland expressly holds that, if success "on a legal claim can be characterized as purely technical or *de minimis*," it is "insufficient to support prevailing party status." 489 U.S. at 792. Thus, while *Garland* does state that "the degree of the plaintiff's overall success goes to the reasonableness of the award . . . , not to the availability of a fee award *vel non*," the decision qualifies that statement by

requiring that a "material alteration of the legal relationship of the parties" first be found to have occurred; and *Garland* makes it plain that the determination whether such a "material alteration" has occurred requires an evaluation of the "significance" of the plaintiff's success "in the context of th[e] litigation" as a whole. *Id.* at 793, 792.

Petitioners argue (Pet. Br. 13) that *Garland*'s reference to "technical" or "*de minimis*" successes refers only to situations where, as in *Garland*, an unconstitutional practice or policy has not been applied to the victorious plaintiff. But the discussion of "technical" or "*de minimis*" victories in *Garland* cannot be so limited to the facts of that case. The Court was discussing the general standard for identifying "prevailing parties." *See* 489 U.S. at 792-93. Moreover, while the practice at issue in *Garland* had not been applied to the victorious plaintiff, the characterization of the victory in that case as a "technical" or *de minimis* one turned on the insignificance of that victory in the context of the case as a whole. *Id.* Indeed, the Court cited (*id.*) with approval, as further examples of *de minimis* victories, cases that did not involve mere challenges to policies or practices that had not been applied and that, in fact, demonstrate that "prevailing party" status must be denied where the plaintiff fails to obtain a material aspect of the relief sought in the complaint (irrespective of whether a judgment is obtained). *See Chicano Police Officers Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980) (nuisance settlement not sufficient to support "prevailing party" status); *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d at 724 n.4 (success on minor issue is not sufficient to support "prevailing party" status).

4. Petitioners and the ABA further argue (Pet. Br. 14-16; ABA Br. 11-17) that evaluating the significance of the plaintiff's success in the context of the entire relief sought in the litigation is inconsistent with *Garland*'s

rejection of the "central issue" test of "prevailing party" status. This argument is unfounded.

Contrary to the argument of petitioners and the ABA, the "central issue" test is not the same as the "*de minimis* success" test applied by the court below. The "central issue" test required an inquiry into the relative importance to the plaintiff of the various legal claims and prayers for relief in a case; under that test, in order to be a "prevailing party," the plaintiff had to prevail on the issue motivating a piece of litigation and obtain the "primary relief" sought. *Garland*, 489 U.S. at 787-88, 790-91. By contrast, the "*de minimis* success" test applied by the court below does not inquire into the relative importance to the plaintiff of the various legal claims and prayers for relief in a case; it inquires only whether the plaintiff has obtained some material aspect of the relief sought in the complaint.

Petitioners and the ABA are equally wrong in suggesting that the reasons given by the Court in *Garland* for rejecting the "central issue" test apply to the "*de minimis* success" test applied by the court below. As *Garland* itself concludes, congressional intent that a party need not prevail on all issues in order to obtain an award of attorney's fees has no application to a plaintiff who does not obtain anything more than "trivial success" on any issue in the case. 489 U.S. at 792-93; *accord Ruckelshaus v. Sierra Club*, 463 U.S. at 688 n.9. Moreover, in contrast to the "central issue" test, the "*de minimis* success" test does not render the availability of a fee award potentially dependent on the timing of a request for fees, since a fee award will be appropriate only after a plaintiff has obtained a non-technical victory on a significant issue in the litigation. Finally, in contrast to the "central issue" test, the "*de minimis* success" test does not focus on the mental state of the parties or promise to mire district courts in unmanageable inquiries; rather, the test focuses on the relief requested in the complaint and

simply requires the district court to determine whether the plaintiff has obtained a material aspect of it. *See* Fed. R. Civ. P. 8(a)(3) (requiring plain statement of relief requested); *see also Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743 (1976).

Indeed, as the ABA inconsistently concedes (ABA Br. 19 n.12), "[u]nlike determining the 'central issue' or 'primary relief sought,' . . . assessing the degree of success in light of the entire litigation is a straightforward task that this Court has repeatedly entrusted to district courts." The Court has instructed district courts to give primary weight to the plaintiff's "degree of success" in setting the amount of a fee award. *See, e.g., Hensley*, 461 U.S. at 440; *Garland*, 489 U.S. at 789-90. There is no reason to believe that the courts will be unable manageably to conduct a similar, albeit less demanding, inquiry to assess whether plaintiffs have crossed the threshold for recovery of any attorney's fee award at all. In fact, as noted above (at 14-15, *supra*), the courts are already conducting this inquiry under Rule 54(d) in determining whether "costs" should be awarded to victorious plaintiffs.

5. Petitioners and the ABA further argue (Pet. Br. 5-7, 21-23; ABA Br. 1-2, 4-6) that a "*de minimis* success" test of this type is inconsistent with various indicators of congressional intent under Section 1988. But they are wrong in each respect.

Contrary to their argument, the "*de minimis* success" test is not inconsistent with congressional intent to attract counsel to civil rights cases where little or no damages are perceived as potentially recoverable. The "*de minimis* success" test applied by the court below does not require that a plaintiff recover extensive monetary relief in order to be treated as a "prevailing party"; indeed, it does not on its face preclude a plaintiff in an appropriate case from being a "prevailing party" upon recovery of a nomi-

nal damage award. It simply requires a plaintiff who seeks only extensive monetary relief to recover some material aspect of that relief in order to be treated as a "prevailing party." Such a rule should not in any way discourage lawyers from representing civil rights claimants in cases in which non-pecuniary rights are involved, or in which little or no damages are perceived as potentially recoverable. By definition, cases in which lawyers have satisfied themselves, pursuant to Federal Rule of Civil Procedure 11, that there is a reasonable basis for seeking extensive monetary relief are not cases in which only non-pecuniary rights are involved or in which little or no damages are perceived as potentially recoverable. *See Lewis v. Kendrick*, 944 F.2d at 956.

Likewise, contrary to the argument of petitioners, the "*de minimis* success" test is not inconsistent with congressional intent to restore civil rights attorney's fees law to its status prior to this Court's decision in *Alyeska*. While a number of courts prior to the *Alyeska* decision awarded costs and attorney's fees in cases in which nominal damages were recovered, petitioners do not suggest that those cases involved only requests for extensive monetary relief; and, in any event, as explained above (at 16-17, *supra*), other cases denied costs and attorney's fees where the relief awarded was *de minimis* in relation to the relief requested. The decision below is simply another in this part of the line of "restored" case law.

Finally, contrary to the argument of petitioners, Congress neither intended that civil rights plaintiffs would be treated the same as antitrust plaintiffs in all respects for purposes of attorney's fee awards nor understood that antitrust plaintiffs would receive attorney's fee awards for *de minimis* victories. While the legislative history of Section 1988 does indeed suggest that "the amount of fees awarded under [Section 1988 shall] be governed by the same standards which prevail in other types of equally

complex Federal litigation, such as anti-trust cases . . .," S. Rep. 1011, *supra* at 6, the statute makes it plain that the decision to award fees in civil rights cases is subject to equitable standards; in contrast, attorney's fee awards under the antitrust statutes are mandatory, are awarded only to plaintiffs, and are not subject to equitable constraints. *See Alyeska*, 421 U.S. at 261. Furthermore, while civil rights plaintiffs are entitled to an award of fees whenever they are "prevailing parties," antitrust plaintiffs are entitled to fee awards only when they "substantially prevail[]" (15 U.S.C. § 26) or are "injured in [their] business or property . . . ." (15 U.S.C. § 15). Thus, while a nominal damage award may in some circumstances entitle an antitrust plaintiff to an award of fees, it appears that it would do so less frequently than it would for a civil rights plaintiff (since the civil rights plaintiff need not "substantially" prevail or show injury to "business" or "property"). In all events, a nominal damages award would not appear to entitle an antitrust plaintiff to a fee award if it would only amount to a *de minimis* victory.

6. Petitioners finally argue (Pet. Br. 7-8, 25-29) that, since nominal damage awards have traditionally justified the shifting of costs, and since attorney's fees are treated as "costs" under Section 1988, nominal damage awards should justify the shifting of attorney's fees under Section 1988. As explained above (at 13-14, *supra*), however, while the common law in England treated nominal damage awards as sufficient to support shifting of costs, since 1670 both English and American courts and legislatures have developed contrary rules; indeed, as also explained above (at 14-15, *supra*), courts interpreting Rule 54 of the Federal Rules of Civil Procedure have consistently refused to shift even routine costs where, as here, the relief obtained is *de minimis* in relation to the relief sought. Moreover, while attorney's fees are treated as part of "costs" under Section 1988, the authorization for the shifting of attorney's fees is found in the separate "pre-

vailing party" standard of Section 1988; and courts have agreed that disposition of the issue of statutory costs does not necessarily control the award of fees under Section 1988. *See Fewquay v. Page*, 907 F.2d 1046 (11th Cir. 1990); *Chemical Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1278 (5th Cir. 1989); *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 681 (6th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1083 (1986). In all events, when one considers "the historic principles of fee-shifting in this and other countries, . . . the conclusion that some success on the merits be obtained before a party becomes eligible for a fee award" necessarily follows, and a "trivial success" has never been sufficient. *Ruckelshaus v. Sierra Club*, 463 U.S. at 682, 688 & n.9. A nominal damage award in a case seeking $17 million in monetary relief is just such a "trivial success."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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June 15, 1992

QUESTION PRESENTED

Whether a plaintiff who obtains a judgment for nominal damages thereby is entitled to "prevailing party" status under 42 U.S.C. § 1988, without regard to whether he otherwise meets the Court's definition of a "prevailing party."

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-990

DALE FARRAR, *et al.*,
Petitioners,
v.

WILLIAM HOBBY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES HENRY HYDE AND JOE BARTON, AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial percentage of its resources to advancing the interests of the free enterprise system. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases affecting business.

WLF believes that our nation's free enterprise system has suffered greatly in recent decades as a result of the litigation explosion that has clogged both state and federal courts and that the proliferation of federal statutes providing for awards of attorney fees to "prevailing" plaintiffs in certain classes of cases (particularly environmental and civil rights cases) -- as well as court decisions construing the term "prevailing" plaintiff too liberally -- have contributed significantly to that trend. While WLF fully supports enforcement of our nation's environmental and civil rights laws, WLF believes that the chief results of providing an overly-liberal definition of "prevailing" plaintiffs in environmental and civil rights cases have been to line the pockets of the nation's lawyers at the expense of taxpayers and to increase the quantity of unmeritorious lawsuits clogging our courts.

Rep. Henry Hyde (R-Ill.) and Joe Barton (R-Tex.) are members of the U.S. House of Representatives. Both are concerned that the congressional statute at issue in this case, 42 U.S.C. § 1988, not be interpreted to provide for attorney fee awards to plaintiffs who have not "prevailed" in any meaningful sense and whom Congress thus never intended to subsidize. Both believe that taxpayers in Texas and elsewhere should not be forced to pay the fees of lawyers who have accomplished nothing in their suits against the government.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions. AEF believes that the public interest is best served by a legal system that does not overcompensate lawyers and does not provide too many incentives for the filing of lawsuits.

Amici are particularly eager to file their brief in order to dispel any notion -- that might arise due to the filing of an *amicus* brief by the American Bar Association on behalf

of Petitioner -- that lawyers as a group support a liberal definition of "prevailing" plaintiffs within the meaning of federal fee-shifting statutes. Many lawyers, including those at WLF, share the public's distaste for the large fees often awarded under those statutes to attorneys who have not accomplished much of anything. Indeed, WLF has had a policy of never seeking an award of attorney fees as the prevailing party in litigation.

Both WLF and AEF appeared as *amici* in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*), and again in *City of Burlington v. Dague*, No. 91-810, *cert. granted*, 112 S. Ct. 964 (1992), arguing that attorney fees awarded under federal fee-shifting statutes should not be enhanced to compensate the plaintiff's attorney for assuming the risk of nonrecovery. Neither WLF, AEF, nor either Rep. Hyde or Rep. Barton has any financial interest in the outcome of this case, and thus they can assist the Court by providing a perspective that is distinct from that of either party.

Amici submit this brief on behalf of Respondent with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Respondent's brief.

In brief, in the 1970s Petitioner Dale L. Farrar and his father, Joseph D. Farrar, owned and operated Artesia Hall, a school in Liberty County, Texas for the care of delinquent, handicapped, or disturbed teenage boys and girls. The death of an Artesia Hall student led to an investigation of the school by state officials and to Joseph Farrar's criminal indictment in 1973 for willful failure to provide proper medical treatment and timely hospitalization for the deceased. Although the criminal charges were later

dropped, Texas state officials were able to obtain a court injunction requiring the closure of Artesia Hall.

In 1975, Joseph Farrar filed suit against a number a Texas State officials, including Respondent William Hobby (who was then the Lieutenant Governor of Texas), alleging that the officials had participated in a conspiracy to deprive him of his civil rights by pushing for Artesia Hall's closure.[1] By the time the case went to trial in 1983, Petitioners had dropped all claims for injunctive relief but were seeking $17 million in damages.

The case went to the jury on special interrogatories. The jury completely exonerated all respondents other than Respondent Hobby. The jury then found, in answer to interrogatories, that Lt. Governor Hobby "had committed an act . . . that deprived Plaintiff Joseph Farrar of a civil right" in connection with the closure of Artesia Hall[2] but that Hobby's actions were not a "proximate cause" of any damages suffered by Joseph Farrar. Accordingly, the jury awarded no damages to the Farrars. On appeal, the United States Court of Appeals for the Fifth Circuit rejected most of Petitioners' claims but did hold that in light of the jury's finding that Hobby had violated one of Joseph Farrar's civil rights, Petitioners were entitled to an award of $1 in nominal damages.

Petitioners then sought an award of attorney fees under 42 U.S.C. § 1988, arguing that the award of $1 in nominal damages was sufficient to make them "prevailing

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[1] The complaint was later amended to add Petitioner Dale Farrar as a plaintiff. After Joseph Farrar's death in 1983, Dale Farrar and Petitioner Patricia Smith (as Co-Administrators of Joseph Farrar's estate) were substituted as plaintiffs for Joseph Farrar.

[2] The jury's interrogatory answers merely stated "Yes" in response to an inquiry regarding whether one of Joseph Farrar's civil rights had been violated, and they provided no details of what the violation (which the jury found did not injure Joseph Farrar) might have consisted.

parties" within the meaning of that statute. The district court agreed, and awarded Petitioners $280,000 in fees, $28,000 in expenses, and prejudgment interest. The Fifth Circuit reversed, finding that Petitioners were not "prevailing parties" within the meaning of 42 U.S.C. § 1988.[3] Petitioners have sought review of that decision in this Court.

SUMMARY OF ARGUMENT

Petitioners are asking the wrong question in this lawsuit. They ask whether a plaintiff who has obtained a nominal damages award is entitled to "prevailing party" status within the meaning of 42 U.S.C. § 1988, and they answer their question in the affirmative. Petitioners undoubtedly are correct that some plaintiffs who obtain no relief other than nominal damages will qualify as prevailing parties, but whether they qualify bears little relation to the type of judgment they received.

In order to qualify as a "prevailing party" under 42 U.S.C. § 1988, a plaintiff must meet the two standards set forth in *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 109 S. Ct. 1486 (1989): (1) whether the plaintiff can point to a resolution of the dispute which changes the legal relationship between him and the defendant; and (2)

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[3] Section 1988 provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (emphasis added). Because the Fifth Circuit held that Petitioners were not prevailing parties within the meaning of § 1988, it had no occasion to consider whether an award of more than $300,000 in fees and expenses to parties who had succeeded in establishing entitlement to only $1 of the $17 million in damages they had sought constituted a "reasonable attorney's fee."

whether the plaintiff can show that his success on a legal claim is not "so insignificant" as to be characterized as "purely technical" or "*de minimis*." *Garland*, 109 S. Ct. at 1493.

Petitioners plainly fail to meet that standard in this case. The nominal damages award in this suit afforded Petitioners no relief whatsoever. They did not obtain an order permitting the reopening of Artesia Hall or enjoining state officials from interfering with operations of the school in the future. They did not obtain a declaratory judgment that state officials acted wrongly toward them. Nothing in the judgment suggests that the jury can be said to have cleared the Farrar family name from allegations that led to Artesia Hall's closure. No state officials will be able to look to this case for guidance regarding how they should deal with youth home operators accused of serious wrongdoing, because nothing in the jury's interrogatory answers specifies how Mr. Hobby may have wronged Petitioners. That failure to provide guidance, when coupled with the jury's determination that Mr. Hobby did nothing that caused quantifiable damages to Petitioners, makes clear that any success attained by Petitioners in this case can fairly be described as "purely technical" or "*de minimis*."

Congress did not intend to confer "prevailing party" status on every plaintiff who establishes a constitutional violation. Both *Garland* and *Rhodes v. Stewart*, 488 U.S. 1 (1988), make clear that regardless whether a proven infraction reaches constitutional dimension, "prevailing party" status will be conferred only on those plaintiffs that can meet the standards set forth in *Garland*.

Petitioners have only themselves to blame for obtaining an essentially meaningless judgment. Had their purpose been to achieve vindication of a constitutional principle without regard to the number of dollars at stake, they could have filed a complaint that explicitly sought nominal damages and/or declaratory relief. In that event, interrogatories could have been submitted to the jury that

would have provided the jury with an opportunity to express which of Petitioners' civil rights, if any, it believed were violated by Mr. Hobby. Instead, Petitioners sought only monetary damages, and that claim was flat-out rejected by the jury; Petitioners were left with nothing but an opaque nominal damages judgment that was essentially meaningless. Petitioners should not be heard to complain about the denial of their "prevailing party" claim when the reason for that denial -- failure to obtain any meaningful relief -- may well have been a direct result of their failure to seek either nominal damages or declaratory judgment.

ARGUMENT

I. PETITIONERS ARE NOT "PREVAILING PARTIES" BECAUSE THEIR LAWSUIT FAILED TO ALTER MATERIALLY THE RELATIONSHIP BETWEEN THEM AND RESPONDENT HOBBY

A. Petitioners Are Focusing on the Wrong Issue in Pointing to Their Recovery of Nominal Damages

Petitioners have phrased the Question Presented in this case as follows: "Does 42 U.S.C. § 1988 authorize the award of reasonable attorney's fees to civil rights plaintiffs who recover nominal damages?" Petition for Writ of Certiorari at i. The answer to that question quite clearly is yes: there are circumstances under which a civil rights plaintiff who recovers only nominal damages may nonetheless be entitled to an award of attorney fees under 42 U.S.C. § 1988. But the answer to that question does not begin to answer the question whether Petitioners are entitled to an attorney fee award in *this* case. Whether a plaintiff has recovered nominal damages is not a relevant issue under the standards established by the Court in *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 109 S. Ct. 1486 (1989), for determining when a plaintiff can be said to be a "prevailing party" within the meaning of 42 U.S.C. § 1988.

Under *Garland*, the relevant issue is whether "the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Garland*, 109 S. Ct. at 1493 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). *Garland* held that a plaintiff must clear two hurdles in order to make such a showing and thus establish entitlement to a fee award. First, "at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Garland*, 109 S. Ct. at 1493. Second, a plaintiff meeting the first standard must also show that its success on a legal claim is not "so insignificant" as to be characterized as "purely technical" or "*de minimis*." *Id.*

Thus, Petitioners, by focusing solely on the fact of a $1 nominal damages award in this case, are focusing on the wrong issue. An award of nominal damages may in some cases "change the legal relationship" between the parties to a lawsuit, but in other cases it may not. Similarly, an award of nominal damages in some cases could be characterized as a "purely technical" or "*de minimis*" success and in other cases could be precisely the relief being sought by the plaintiff. Observing that a plaintiff has recovered nominal damages is not a shortcut for performing the analysis prescribed by *Garland*.

The common law has long recognized that an award of nominal damages at times may represent nothing more than a technical victory for the plaintiff and at other times may represent a total victory. For example, the Restatement of Torts explained:

> Nominal damages can be awarded in cases where a person has sought to recover substantial damages and has failed to prove substantial harm. Such damages can be awarded also where the plaintiff has not claimed compensatory damages but has sued only to

> establish a right, to vindicate his reputation, or to obtain a ruling by a court that the defendant's conduct was tortious. Thus actions are frequently brought for non-harmful trespass to land to establish the plaintiff's right in the land or to prevent the creation of a presumptive right to cross the land. Similarly, actions may be brought to establish a right to a patent or a process, or to establish that the defendant's acts constitute tortious interference therewith.

Restatement of Torts § 907, comment b (1939). The Restatement of Torts 2d carried forward comment b virtually unchanged. Accordingly, that Petitioners obtained a $1 nominal damages award in this case does not by itself establish their status as "prevailing parties."

B. Petitioners Cannot Point to Any Benefit They Derived from This Case or to Any Changes in the Legal Relationship Between Themselves and Hobby

Petitioners cannot be considered "prevailing parties" within the meaning of 42 U.S.C. § 1988 unless they obtain "some of the benefit" they sought in bringing suit. *Garland*, 109 S. Ct. at 1493. Yet, one searches Petitioners' brief in vain for any indication of what they believe they gained from the judgment in this suit. They did not obtain an order permitting the reopening of Artesia Hall or enjoining state officials from interfering with operations of the school in the future. They did not obtain a declaratory judgment that state officials had acted wrongly toward them. There was no judgment stating that state officials were wrong in believing that Artesia Hall was being operated in a substandard manner and therefore deserved to be shut down. Nothing in the judgment suggests that the jury can be said to have cleared the Farrar family name from allegations that led to the school's closure. All Petitioners can point to is an opaque jury finding that one of the state officials, Respondent Hobby, acted toward Petitioners in a manner that deprived

Joseph Farrar of an unspecified civil right but that the deprivation did not cause any injury. As a result of that finding, Petitioners were awarded $1 of the $17 million in damages they sought in this case. It simply is not plausible that the *de minimis* results actually achieved by Petitioners could be said to constitute "some of the benefits" they sought in bringing suit.

Nor can one seriously contend that the legal relationship between the parties has changed as a result of the $1 judgment in this case. The judgment will have no effect on any future business dealings between Petitioners and state officials, or between Petitioners and Mr. Hobby. The ambiguity of the jury's interrogatory answers means that no one will be able to look to this case for guidance regarding how state officials in the future should deal with youth home operators accused of serious wrongdoing. When the only relief sought by a plaintiff is monetary relief and the jury decides that the plaintiff suffered zero damages at the hands of the defendant, the legal relationship between the parties cannot be said to have been altered by the judgment.

As the passage from the Restatement of Torts quoted above indicates, an award of nominal damages sometimes is all that a plaintiff is seeking in a lawsuit; for example, a plaintiff may sue for nominal damages to establish rights in a patent, even where he has suffered no monetary damages. A plaintiff bringing such a suit and obtaining a nominal damages award really can be said to have altered the legal relationship between the parties; a successful patent suit for nominal damages establishes the validity of the patent and the defendant's obligation to honor it. Such a plaintiff undoubtedly qualifies as a "prevailing party." But as the Restatement of Torts indicates, such a plaintiff is analytically distinct from the plaintiff seeking monetary relief alone and who is awarded nominal damages after failing to establish any real damages.

Petitioners' contention that the $1 debt owed them by Mr. Hobby constitutes a change in their legal relationship

is an exultation of form over substance. The substance of the judgment in this case is a jury finding that Petitioners were not injured by Mr. Hobby's conduct; the $1 in nominal damages was awarded solely in recognition of the jury's finding of a civil rights violation. The Court has made clear that where, as here, "[t]he only 'relief' [that the plaintiff has] received [is] the moral satisfaction of knowing that a federal court concluded that his rights had been violated," a plaintiff is not a "prevailing" party within the meaning of 42 U.S.C. § 1988. *Hewitt v. Helms*, 482 U.S. 755, 762 (1987).

Although *Hewitt* is potentially distinguishable on the grounds that the plaintiff in that case never received any judgment whatsoever, not even nominal damages,[4] the Court's subsequent decision in *Rhodes v. Stewart*, 488 U.S. 1, 109 S. Ct. 202 (1988), cannot be distinguished from this case in a similar fashion. The plaintiffs in *Rhodes* had obtained a valid declaratory judgment that prison officials had violated their rights by refusing them permission to subscribe to a magazine. The Court nonetheless found that the plaintiffs were not "prevailing parties" entitled to an attorney fee award because the declaratory judgment they obtained "afforded the plaintiffs no relief whatsoever": the plaintiffs were not still in prison at the time the judgment was entered and thus had no need for prison-approved magazine subscriptions. *Rhodes*, 109 S. Ct. at 203-204. In other words, *Rhodes* put to rest any argument that the mere entry of a formal judgment in one's favor is sufficient to establish one's status as a "prevailing" plaintiff under § 1988; prevailing party status also requires the plaintiff to make some showing that he has benefitted from the judgment.

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[4] The plaintiff in *Hewitt* brought a suit for money damages, alleging that prison officials had violated his due process rights by convicting him on misconduct charges on the basis of hearsay. Although a federal appeals court found that prison officials had acted improperly, judgment was entered for the prison officials on the basis of their qualified immunity from money damage claims. *Id.* at 758-759.

The notion that technical victories cannot support a fee award to the plaintiff is not a recent invention of the Court; indeed, it predates the adoption of 42 U.S.C. § 1988. For example, the Court stated in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), that when a stockholder's suit confers substantial benefit on the corporation and other stockholders, the plaintiff is entitled to recover his attorney fees from the corporation; but the Court noted that a benefit cannot be said to be "substantial" so as to merit a fee award if the judgment obtained by the stockholder is merely "'technical in its consequence.'" *Mills*, 396 U.S. at 396 (quoting *Bosch v. Meeker Cooperative Light & Power Assn*, 257 Minn. 362, 367, 101 N.W.2d 423, 427 (1960)). *See also*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 n.9 (1983) ("we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under [fee-shifting] statutes" providing for an award of fees "when appropriate").

Amicus American Bar Association (ABA) argues against a rule that would permit fee awards based on some nominal damages judgments but not on others, contending that such a rule "would call upon the courts to make impossible judgment calls" and that "[t]here are no reliable standards" by which to assess whether a judgment is "merely technical." ABA Brief at 16-17. But the judgment calls decried by the ABA are precisely the types of decision-making mandated by this Court's decisions from *Mills* to *Rhodes*. It is no more difficult to determine whether a plaintiff has had any meaningful success in his lawsuit in the context of a nominal damages judgment than it is in the context of any other type of judgment.

Petitioners concede that the degree of their success in this litigation is relevant in determining a fee award; they argue, however, that their receipt of nominal damages gets them past the "prevailing party" hurdle and that the degree of their success only goes to the "reasonableness" of a fee award. Pet. Br. 11-12. Even if one were to accept Petitioners' analytical approach, they would still not be

entitled to a fee award. A "reasonable" fee for a party that sought only monetary damages, that succeeded in obtaining only $1 of the $17 million in monetary damages being sought, and that obtained at most a "technical" victory is zero dollars. *Amici* see no point in Petitioners' insistence that all plaintiffs who obtain nominal judgments should be deemed "prevailing parties," given that those whose nominal damages judgments cannot meet *Garland*'s threshold test regarding what constitutes a "prevailing party" most certainly could not show that an award to them of any amount of attorney fees would be "reasonable." Moreover, bypassing the "prevailing party" issue and going straight to the reasonableness-of-the-fee issue would not make § 1988 fee cases any less analytically cumbersome for the courts, because courts -- when dealing with the reasonableness-of-the-fee issue -- would still be required to address whether the plaintiff has had any meaningful success in his lawsuit.

In sum, although there are instances in which a nominal damages judgment can be sufficient to trigger an award of attorney fees under § 1988, this is not such a case. Petitioners failed to obtain any of the benefits they sought in bringing suit and thus cannot be considered "prevailing" plaintiffs within the meaning of 42 U.S.C. § 1988.

II. CONGRESS DID NOT INTEND TO CONFER "PREVAILING PARTY" STATUS ON EVERY PLAINTIFF WHO ESTABLISHES A CONSTITUTIONAL VIOLATION

Petitioners' argument that they are "prevailing parties" relies primarily on this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978). Petitioners read too much into *Carey*.

Carey involved public school students who sued for monetary, declaratory, and injunctive relief based on claims that they had been suspended from school in violation of their procedural due process rights. The district court found a due process violation but denied all

relief in the absence of evidence that the students had been injured. *Carey*, 435 U.S. at 252. The court of appeals reversed, holding that the due process violation finding entitled the students to declaratory and injunctive relief, as well as recovery of substantial "nonpunitive" damages even in the absence of evidence that the students had been injured. *Id.* at 253. The Supreme Court reversed the court of appeals' holding regarding damages. The Court held that substantial nonpunitive damages could *not* be awarded in the absence of evidence of injury, but that "a denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.* at 267.

We note initially that *Carey* never dealt with the issue of when a plaintiff can be considered a "prevailing party" within the meaning of 42 U.S.C. § 1988. While it held that a plaintiff who can demonstrate a violation of his procedural due process rights is entitled to an award of nominal damages, it never suggested that all such plaintiffs are entitled to attorney fee awards.

Moreover, Petitioners' reading of *Carey* proves too much. Petitioners' argument -- that *Carey* held that "there are no *de minimis* constitutional deprivations" (Pet. Br. at 14) and thus that anyone who establishes constitutional deprivations qualifies as a "prevailing party" -- simply reads the Court's subsequent decisions in *Rhodes* and *Garland* out of the case law. The *Rhodes* plaintiffs, two inmates who obtained a declaratory judgment that prison officials had violated their constitutional rights to subscribe to magazines, were nonetheless held not to be "prevailing parties" because they failed to obtain any meaningful relief. *Rhodes*, 109 S. Ct. at 203-204. *Garland* stated that an "insignificant" or "technical" victory is "insufficient to support prevailing party status," even where the victory includes proving a constitutional violation. *Garland*, 109 S. Ct. at 1493. As an example of a constitutional violation that by itself would be too "insignificant" to confer prevailing party status, the Court cited a lower-court finding striking down as "overly

vague" a school district requirement that meetings between teachers and union representatives could be conducted on school premises during non-school hours only with the permission of the school principal; the Court noted that such permission had never been denied. *Id.* In sum, *Rhodes* and *Garland* make clear that Congress did not intend to confer § 1988 prevailing party status on every plaintiff who establishes that one of his constitutional rights was violated; the standards established by *Garland* for determining whether a plaintiff is a "prevailing party" are the same regardless whether the plaintiff's claims are constitutional or non-constitutional.

III. A PLAINTIFF WHOSE PURPOSE IS TO VINDICATE A CONSTITUTIONAL PRINCIPLE SHOULD STATE THAT PURPOSE PLAINLY BY EXPRESSLY SUING FOR NOMINAL DAMAGES OR DECLARATORY JUDGMENT

A principal reason that the judgment in this case cannot be said to have altered materially the relationship between the parties is that it is essentially meaningless; no lessons can be learned from the judgment. The judgment fails to provide Mr. Hobby or other state officials with any guidance regarding where they went wrong in their treatment of Petitioners or how they can alter their future conduct to avoid depriving others of their civil rights.

Petitioners have only themselves to blame for the opaqueness of the judgment in this case. Had they sought a declaratory judgment or nominal damages, then the issues could have been framed to the jury in such a way as to permit the jury to state clearly how it believed that Petitioners' rights had been violated.[5] Petitioners should

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[5] For example, the jury could have been asked whether Mr. Hobby had violated any of Petitioners' civil rights and, if so, to specify what rights had been violated and the manner of the violation. Alternatively, the jury could have been asked whether specifically

(continued...)

not be heard to complain about the denial of their prevailing party claim when the reason for that denial -- failure to obtain any meaningful relief -- may well have been a direct result of their failure to seek either nominal damages or declaratory judgment.

Moreover, an award of nominal damages is not by itself an indication of meaningful relief. Petitioners cite case law and treatises attesting to the importance accorded nominal damages judgments in past centuries. Pet. Br. 25-29. Petitioners fail to point out, however, that declaratory judgments were unavailable in this country before 1919,[6] and thus a suit for nominal damages was often the only way that an aggrieved party who had suffered no out-of-pocket loss could obtain a judgment declaring his rights. With the increased availability of declaratory judgments, suits for nominal damages have become less common in recent years. Today, nominal damages judgments are far more likely than in centuries past to result from a failed

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[5] (...continued)
enumerated acts of Mr. Hobby had violated Petitioners' procedural due process rights. Instead, because Petitioners sought only monetary relief (which was denied by the jury), we are consigned to guessing what the jury meant when it said -- during the course of rejecting all of Petitioners' requested relief -- that Petitioners' civil rights had been violated. Presumably, the jury was indicating that Mr. Hobby had not accorded Petitioners all procedural protections due them during the course of proceedings to revoke Petitioners' license to operate Artesia Hall. But one cannot infer from the jury's interrogatory answers that the license revocation was wrongful or that Petitioners were denied any more than one of the scores of procedural due process protections mandated by the Due Process Clause. Indeed, the failure of the jury to award any damages to Petitioners is a good indication that the jury believed that the violations of Petitioners' civil rights were trivial.

[6] *See generally*, Wright, Miller, & Kane, *Federal Practice and Procedure: Civil 2d* § 2752 at 571 (1983). Declaratory judgments were not available in the federal courts until 1934 with the adoption of the Federal Declaratory Judgment Act (Act of June 14, 1934, c. 512, 48 Stat. 955), which followed this Court's decision in *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933), that federal courts had constitutional authority to issue declaratory judgments.

attempt to obtain a monetary award than from a genuine desire to obtain a declaration vindicating one's legal rights. A litigant in the latter position has achieved a victory that merits an attorney fee award. In contrast, there is no indication that Congress intended to hand out fee awards to Petitioners and similarly situated litigants who have failed in their efforts to win monetary damages and who can point only to a meaningless nominal damages award.[7]

In sum, Petitioners' pleadings made clear their sole object in this lawsuit: a monetary award. They failed in that effort and should not now be heard to complain that they are nonetheless entitled to an attorney fee award based on a nominal damages award that -- due to Petitioners' consciously chosen litigation strategy -- is devoid of all meaning.

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[7] A plaintiff who obtains a declaratory judgment almost surely qualifies as a "prevailing party" under 42 U.S.C. § 1988, because an award of declaratory relief is discretionary with a district court (*Hewitt*, 482 U.S. at 762), and a court is likely to deny declaratory relief to a plaintiff who has demonstrated no more than a technical violation of his rights. In contrast, the Fifth Circuit in this case interpreted *Carey* as requiring entry of a nominal damages award in *all* cases in which a constitutional violation is found. Pet. App. 10. Accordingly, when a plaintiff who has obtained a nominal damages award seeks § 1988 "prevailing party" status, it becomes necessary to apply the *Garland* test to determine whether the plaintiff has obtained any meaningful relief.

CONCLUSION

Amici curiae Washington Legal Foundation, U.S. Representative Henry Hyde and Joe Barton, and the Allied Educational Foundation respectfully request that the judgment below be affirmed.

Respectfully submitted,

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June 15, 1992

(10)

No. 91-990

In The

Supreme Court of the United States

October Term, 1991

DALE FARRAR and PAT SMITH, Co-Administrators of the Estate of Joseph D. Farrar, Deceased, *Petitioners*,
vs.

WILLIAM P. HOBBY, JR., *Respondent*.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, THE TERRITORY OF GUAM, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fifth Circuit's judgment, denying all attorneys fees to Petitioners, who won only a one dollar nominal damages judgment, should be affirmed either on the basis that Petitioners were not "prevailing parties" under 42 U.S.C. § 1988, or, alternatively, on the basis of the congressionally mandated rule barring fees if "special circumstances" make "an award unjust"?

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No. 91-990

In The

Supreme Court of the United States

October Term, 1991

DALE FARRAR and PAT SMITH, Co-Administrators of the Estate of Joseph D. Farrar, Deceased, *Petitioners*,

vs.

WILLIAM P. HOBBY, JR., *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, THE TERRITORY OF GUAM, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The States, Commonwealths, and Territories who appear by this brief amici curiae have an abiding interest in this case, in which the Fifth Circuit concluded, as a

matter of law, that Petitioners, who won nothing more than a one dollar nominal damages judgment, should be awarded no attorneys' fees under the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988.

As government entities, the amici are generally not liable for damages under the federal laws to which § 1988 applies.[1] *See Ngiraingas v. Sanchez*, 495 U.S. 182 (1990); *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *see also Quern v. Jordan*, 440 U.S. 332 (1979). Attorneys' fees in nominal damages cases, if appropriate, would therefore generally be paid by individual state officers out of their own assets, municipal corporations which do not share the States' Eleventh Amendment immunity, or private insurance. Nonetheless, the amici States, Commonwealths, and Territories have an important interest in the manner in which their municipalities and officers are treated in damage suits generally, and, specifically, in those cases where the defendants in such suits have proven that plaintiff suffered no damage whatsoever, and thus only nominal damages may be awarded. Because the amici States, Commonwealths, and Territories strongly believe that the Fifth Circuit was correct in reversing a District Court judgment that mandated a

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[1] Although there is no legal obligation to do so, some States, as a matter of practice, do pay attorneys' fees awards against their State personnel. This practice is intended to recruit and retain qualified individuals for public positions and conforms with legislative intent and state policy to protect state personnel from liability so long as they are acting within the scope of their public duties and responsibilities and are not acting with malice or gross negligence. *See, e.g.*, Md. Ann. Code State Gov't Art. § 12-402 (1984); Mass. Gen. L. ch. 258, § 9 (1992). Georgia maintains a self-insurance fund for payment of judgments and attorney fee awards against officers and employees. *See* O.C.G.A. ch. 9, tit. 45 (1990).

former state official to pay, out of his personal account, attorneys' fees and costs under 42 U.S.C. § 1988 in excess of $317,000 for incurring a mere one dollar liability for purely nominal damages, we urge this Court to affirm the judgment below. We do so not only because the Fifth Circuit was correct in concluding that, under this Court's precedents, Petitioners were not "prevailing parties" in the District Court action underlying this appeal, but also because the judgment of the Fifth Circuit is correct as a matter of law in that the facts here make a fee and cost award so unjust as to warrant the total denial of any relief under 42 U.S.C. § 1988.

SUMMARY OF ARGUMENT

1. The Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988 ["Fees Act"], was not intended, and has not been viewed by this Court, to authorize awards of substantial attorneys' fees where only nominal damages are granted. Although Congress was concerned, when it passed the Fees Act, with suits for equitable relief where no damages would be awarded, not one shred of the legislative history supports the conclusion that a nominal damages award, without more, could give rise to an entitlement to substantial fees under 42 U.S.C. § 1988. Congress's intent, in passing the Fees Act, was to restore the "private attorney general" doctrine, which was rejected, absent congressional authorization, in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Prior to *Alyeska*, that doctrine would not permit a federal plaintiff who had won a mere one dollar judgment to claim fees under a federal court's equity power. Because 42 U.S.C. § 1988, as amended by Congress in 1976, was a direct response to *Alyeska*, this Court should

not interpret that amendment as going further than the pre-*Alyeska* "private attorney general" theory would allow. That theory would not allow fees here, and the judgment below is correct.

2. Even in the absence of such legislative history, the Petitioners have not shown, and could not show now, that they "prevailed" in the manner this Court required in its unanimous opinion in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989). Plaintiffs failed to show success "on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.' " *Id.* at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). In addition, and most importantly, they could not show anything beyond "a technical victory" that did not effect a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at 792-93.

3. Even assuming, *arguendo*, that Petitioners might be "prevailing parties" for purposes of 42 U.S.C. § 1988, that is not the end of the inquiry, for this Court may affirm the judgment on the ground that the circumstances in this case would make " ' "an award unjust." ' " *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citations omitted). The "special circumstances" doctrine is uniquely suited to this case, for the controversy upon which even Petitioners' claim to have prevailed is "more contrived than real," and thus undeserving of fees. In addition, in this case, the underlying merits judgment, which triggered any right to attorneys' fees in the first place, is apparently inconsistent with all principles of substantive law, and, as well, virtually all precepts of qualified immunity doctrine. *See, e.g., Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991).

Contrary to the views of the dissenting judge below, it ought not be too late, at the fee stage in a nominal damages judgment, to consider the relative strength of the parties' claims and defenses in determining if a fee should be awarded. Here, that consideration counsels this Court's affirmance.

ARGUMENT

A. Congress Did Not Intend the Fees Act to Allow Awards of Attorneys' Fees in Those Cases Where Nominal Damages Constituted the Only "Victory" by the Federal Plaintiff.

As this Court has recognized on many occasions, the 1976 amendments to 42 U.S.C. § 1988 were a specific response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). *Alyeska* reaffirmed the "American Rule" with regard to fee-shifting, namely, that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska*, 421 U.S. at 247. As *Alyeska* held, without congressional authorization, or a showing of misconduct by the losing party, there was no power under federal law to tax attorneys' fees against a losing defendant, even under the "private attorney general" theory by which the lower federal courts were awarding private litigants, in certain classes of suits against the United States, the States, their officers, or private parties, their reasonable attorneys' fees.

Because, contrary to Petitioners' understanding, attorneys' fees in non-class, nominal damages cases were *not* awarded under the "private attorney general" theory rejected in *Alyeska*, that Fees Act, which restored

pre-*Alyeska* law and no more, cannot be viewed as codifying an understanding of the term "prevailing party" that permits fee awards in such cases. This view of the legislative history accords with the committee reports and floor debates, and is reflected in the statutory language of section 1988 itself. For these reasons alone, the judgment of the Fifth Circuit is totally correct, and should be affirmed.

Congress's enactment of the Fees Act in 1976 was narrowly targeted to restore the law to the status that had obtained before this Court entered its decision in *Alyeska*. *See* S. Rep. No. 94-1011, 94th Cong. 2d Sess (1976) at 1 (citing *Alyeska*); H.R. Rep. No. 94-1588, 94th Cong. 2d Sess. (1976) at 2 (same). Thus, as Senator Kennedy observed, the Fees Act "is intended simply to expressly authorize the courts to continue to make the kinds of awards of fees that they had been allowing prior to the *Alyeska* decision." 121 Cong. Rec. S16252 (daily ed. Aug. 1, 1975). Representative Drinan, the floor manager in the House, made this point as well, stating that the Fees Act "does not overturn law or practice, except the *Alyeska* case." 122 Cong. Rec. H12163 (daily ed. Oct. 1, 1976). *See also* 122 Cong. Rec. H12154 (daily ed. Oct. 1, 1976). As Representative Railsback, another important co-sponsor of the legislation urged, "what we are really doing is codifying the practice that was going on prior to the *Alyeska* case"); *id.* at H12161 (same); *id.* at H12163 (remarks of Reps. Fish and Kastenmeier) (same).

The "private attorney general" doctrine, as elaborated by this Court in *Alyeska*, was utterly incapable of counseling a fee award in a pure nominal damages case such as this. While Justice White's opinion for the Court was critical of the private attorney general doctrine as

yielding outcomes that were "extremely difficult to predict," the *Alyeska* majority recognized that that doctrine was confined to situations "in which the purported benefits [of the success obtained] accrue to the general public." *Alyeska*, 421 U.S. at 265 n.39. As Justice Marshall wrote, a private attorney general fee was to be allowed only if "the important right being protected is one actually or necessarily shared by the general public or some class thereof." 421 U.S. at 240 (Marshall, J., dissenting).

In light of these shared understandings as to the scope of the private attorney general theory, it is obvious that Petitioners would not have been eligible to obtain a fee award under that doctrine prior to *Alyeska*. Petitioners did not enjoy any right "actually or necessarily shared by the general public or some class thereof." No equitable relief was entered against any "policy" or standing practice of Respondent, no out-of-court practices were changed by reason of the judgment, no class was certified (and, perforce, no classwide relief was ordered), and, indeed, no injury (which may in some cases indicate a risk of harm to others in the future) was found. Under the private attorney general theory at stake in *Alyeska*, Petitioners' claim would have been undeserving of a fee recovery. In light of the history of section 1988, the fee claim here is no better today.

Indeed, specific applications of the private attorney general doctrine, prior to *Alyeska*, to cases involving nominal or small damage awards to a small group of plaintiffs show this compellingly. In 1974, for example, after the court of appeals for the District of Columbia Circuit had issued its decision in *Alyeska*, but before this Court had reversed, Judge Gasch ruled that the "private attorney

general" doctrine was "more circumspect" than an automatic rule by which "costs" were to be awarded as a matter of statutory mandate. Accordingly, the "private attorney general" doctrine would not support an award of fees even when a group of federal plaintiffs had won not just nominal damages, but actual (albeit small) compensatory damages of $100 each. *Tatum v. Morton*, 386 F.Supp. 1308, 1316 (D.D.C. 1974), *rev'd on other grounds*, 562 F.2d 1279 (D.C. Cir. 1977). Indeed, a searching review of the caselaw extant at the time this Court decided *Alyeska* makes very clear that the private attorney general theory which Congress restored in the Fees Act was wholly incapable of supporting an attorneys' fee award in a nominal damages case where plaintiff won only one dollar.[2]

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[2] Petitioners' effort, made apparently for the first time in this Court, to find cases where fees were awarded in pure nominal damage judgment actions prior to *Alyeska* (*see* Pet. Br. at 23 & n.10 (citing cases)), is misleading, and ultimately unconvincing. In *Skehan v. Bd. of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975), the Third Circuit held nothing with respect to attorneys' fees, stating only that if the District Court awarded backpay, fees should be considered under a private attorney general theory. *See* 501 F.2d at 45. *Brito v. Zia Company*, 478 F.2d 1200 (10th Cir. 1973), did not involve solely a nominal damages judgment. In *Brito*, Plaintiffs won a substantial conciliation agreement, and an injunction, in addition to nominal damages for a temporary breach of the agreement. *Thonen v. Jenkins*, 374 F.Supp. 134 (E.D.N.C. 1974), *aff'd on other grounds*, 517 F.2d 3 (4th Cir. 1975), involved awards of compensatory damages of $200, while *Berry v. Macon County Bd. of Education*, 380 F.Supp. 1244 (M.D. Ala. 1971), granted reinstatement, "including retirement credits and general raises in pay, if any, which the plaintiffs would have received had

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At the heart of this conclusion was the notion that the private attorney general doctrine should not unduly discourage a defendant with meritorious defenses from defending on the merits. *Id.* at 1317 (citing and quoting *Alyeska*, 495 F.2d 1026, 1032 (D.C. Cir. 1974)). As Judge Gasch wrote in *Tatum*:

> It should be clear from this discussion that the private attorney general exception adopted by this Circuit in *Wilderness Society* is much too narrow to fit the case at bar. The prospect of paying plaintiffs' attorneys' fees might have compelled the defendant District of Columbia government to make any settlement, including one which might have been considerably more substantial than the damages awarded by this Court, to stay out of court.

386 F.Supp. at 1317. Judge Gasch further observed, as to suits for nominal or small damages, that while the private attorney general doctrine would not apply, the obligations of the private bar would suffice to encourage a sufficient number of suits lest the bar wish to "lend credence to the public's cynical perception of lawyers as

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their employment not been terminated," as well as a nominal damages award, *id.* at 1247-48. Petitioners' emphasis on *Hammond v. Housing Authority*, 328 F.Supp. 586, 588 (D. Ore. 1971), is even more telling. The only reason Plaintiffs did not receive injunctive relief in that case was that "defendant voluntarily discontinued the practice" which was the subject of the lawsuit. *Id.* at 588. This out-of-court victory constitutes independent "success" which this Court has recognized may be the subject of a fee award. The suggestion that *Hammond* involved a pure nominal damages award, and nothing else, is unfounded.

comprising a profession motivated solely by self interest if not greed." *Id.* at 1319.[3]

As the legislative history confirms, fee awards might be available under the private attorney general doctrine when a " 'broad class intended to be benefitted [by the substantive law]' " was affected, even though the wrong at issue "cause little injury to any one individual," 122 Cong. Rec. S16433 (daily ed. Sept. 22, 1976) (remarks of Senator Allen (quoting *Alyeska*, 495 F.2d at 1030)). Yet none of the debates, or committee reports, even suggest that any fees be awarded in nominal damages cases that affect a class of two plaintiffs.

Indeed, in adopting, in the 1976 Act, a fee provision analogous to that in effect under § 4 of the Clayton Act, Congress was aware that in § 4 cases courts would refuse to grant fees that "shocked the conscience," and, as well, that where only damages were awarded, the judicial conscience was uniformly "shocked" at fees equal to more than seventy-eight per cent of a damage award. *See* 122

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[3] The scholarly commentary concerning the "private attorney general" theory of fee recovery further supports the conclusion that fees could not be awarded under that theory for a purely nominal damages judgment. One author, writing in 1973, noted that the private attorney general doctrine applied only to "private parties litigating issues that are important and beneficial not only to the plaintiff, but also to a wide segment of the public." P. Nussbaum, "Attorney's Fees in Public Interest Litigation," 48 *N.Y.U. L. Rev.* 301, 318 (1973). As shown above, however, a pure nominal damages case shares none of these traits. *See also* R. Shapiro, "The Enforceability and Proper Implementation of § 1983 and the Attorneys' Fees Awards Act in State Courts, 20 *Ariz. L. Rev.* 743, 754 & n.82 (1978) (Private attorney general theory was justified on the basis that litigant was vindicating rights "not only for the individual plaintiff, but also for all others similarly situated.") (citing cases).

Cong. Rec. S16559 (daily ed. Sept. 27, 1976). Congress did recognize that obtaining substantial damages against civil rights defendants would frequently require greater skill and time than in the typical tort case, in that "immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." H.R. Rep. No. 94-1588, 94th Cong. 2d Sess. at 9 (1976) (citing this court's immunity decisions in *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); and *Pierson v. Ray*, 386 U.S. 547 (1967)). But this recognition does not in any way signify an intent that defendants who are assessed one dollar in nominal damages be required to pay attorneys' fees.

In sum, while Congress was plainly concerned that fees be awarded upon meritorious claims for significant relief, "particularly in injunction cases where there is no monetary benefit to be gained by the plaintiff," *see* 122 Cong. Rec. H12155 (daily ed. Oct. 1, 1976) (remarks of Rep. Seiberling), Congress plainly did not intend that the Fees Act trigger an obligation to pay fees for insignificant, technical results. Indeed, to create a statute that did otherwise, Congress made plain, would be to create "a food stamp bill for lawyers." 122 Cong. Rec. H12164 (daily ed. Oct. 1, 1976) (remarks of Rep. Jordan). In enacting the 1976 Fees Act, Congress made clear that the Act was "not going to work that way." *Id.* (remarks of Rep. Jordan).

In fact, a view of the Fees Act that allows fees to be granted upon claims for nominal damages, particularly where large damages were sought, is also at odds with the plain language of the Act, which allows fees to be awarded only to "*the* prevailing party." It defies both common sense and the plain language of the Act to term

a suit where only a single claim is litigated, and the defendant succeeds in limiting liability to one dollar, a "victory" for the plaintiff. *Cf. Hewitt v. Helms,* 482 U.S. 755, 762 (1987). Because neither the plain language nor the legislative history support Petitioners' reading of the Fees Act, this Court should affirm the Fifth Circuit's ruling.

B. This Court's Decision in *Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782 (1989), Squarely Requires Affirmance of the Fifth Circuit's Judgment.

In adjudicating that Petitioners were not "prevailing parties" under § 1988, the Fifth Circuit did not even need to plumb the legislative history. This Court's decision in *Texas State Teachers Association v. Garland Independent School District,* 490 U.S. 782 (1989), completely supports, indeed mandates the result reached by the Fifth Circuit. As *Garland* states clearly:

> The floor in this regard is provided by our decision in *Hewitt v. Helms,* 482 U.S. 755 (1987). As we noted there "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.,* at 760. Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. *Id.,* at 760-61; *Rhodes v. Stewart,* 488 U.S. 1, 3-4 (1988). Beyond this absolute limitation, a technical victory may be so insignificant and may be so near the situations addressed in *Hewett* and *Rhodes,* as to be insufficient to support prevailing party status. For example, in the context of this litigation, the District Court found that the requirement that

> nonschool hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague. App. to Pet. for Cert. 58a. The District Court characterized this issue as "of minor significance" and noted that there was "no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours." *Id.,* at 60a, n.26. If this had been petitioners' only success in the litigation, we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988. Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis,* a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied.

489 U.S. at 792.

This language, which forms the central focus of debate in this case, could not more clearly indicate this Court's refusal to countenance fee awards in pure nominal damages cases. At the outset, Petitioners plainly did not receive "some relief on the merits of [their] claim," *id.,* for *that* claim was for seventeen *million* dollars. As this Court ruled in *Rhodes,* merely being a judgment winner is not enough to qualify for § 1988 fees. *See* 488 U.S. at 4. Petitioners did not receive relief on *the* "money claim" filed in the District Court, and hence, did not obtain "the substance of what [they] sought." *Hewitt v. Helms,* 482 U.S. at 761.

But the more important point in cases such as this is that the Petitioners' "success" was obviously "purely technical or de minimis," as those terms are used in *Garland.* A comparison of the District Court's judgment nullifying the Garland School District's rules relating to nonschool hour meetings shows why. For that judgment

to be correct, the *Garland* plaintiffs were required to show not only imminent application of the rule, but the possibility of repetitive prosecutions without any adequate opportunity to present federal defenses in state courts. *See Morales v. TWA*, 60 U.S.L.W. 4444, 4445 (U.S. June 1, 1992) (citing, *e.g., Ex parte Young*, 209 U.S. 123 (1908)). Surely, putting a stop to this sort of imminent, threatened, and ongoing injury is closer to the core of relief which Congress intended to cover by the Fees Act than is the Pyrrhic victory of winning a dollar on a claim in which no injury was inflicted, and, insofar as equitable relief was abandoned or denied, it is the controlling law of the case that no injury would be in any likely way inflicted in the future. *Garland* is therefore controlling *a fortiori*. In any case, at the very least, in a pure nominal damages case, like the case of the unenforced meetings rule at issue in *Garland*, the lack of any injury whatsoever compels the denial of any fee under 42 U.S.C. § 1988.

Both Petitioners' and the American Bar Association's responses to *Garland*'s mandate are unconvincing, and, indeed, ultimately unresponsive to this holding. For their part, Petitioners simply urge, without any reasoning, that *Garland* is inapplicable because their "victory" was neither "meaningless," nor "non-compensable." *See* Pet. Br. at 13. Such a response is no response at all. The American Bar Association likewise never addresses *Garland*'s language concerning "technical, de minimis" success, and that language's direct applicability to nominal damages cases, preferring instead to pick nits with the language of the Fifth Circuit's decision. *See* A.B.A. Brief at 10-17. However, as this Court has repeatedly held, this Court reviews "judgments, not opinions," *see, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837,

842 (1983), and the Fifth Circuit's judgment denying fees is plainly correct. As this Court observed in *Garland*, at some point "the degree of plaintiff's success" is so small that it can be characterized as "technical, or *de minimis*." *Cf.* A.B.A. Brief at 13. In that instance, a Plaintiff is not a "prevailing party" under § 1988.

Contrary to the arguments of Petitioners and their amici, a rule, based on the *Garland* requirement of a victory that crosses the line from "technical, or *de minimis*" success, does not require the lower courts to assess a plaintiff's "true" mental state in bringing suit, and does not amount to the "central issue" test which was rejected in *Garland*. Rather, such a rule recognizes that "[t]he touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship of the parties *in a manner which Congress sought to promote in the fee statute.*" *Garland*, 489 U.S. at 792-93 (emphasis added). Technical "alteration of the legal relationship of the parties" will not do. There is thus no good reason to hold that Congress thought nominal awards would trigger § 1988 fees.[4]

Indeed, there are many good reasons not to hold that a nominal award creates a "prevailing party" entitlement to fees.

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[4] The American Bar Association's argument that affirmance here "would render the availability of a fee award potentially depending 'on the timing of a request for fees' " (A.B.A. Br. at 13) presumes that fees *pendente lite* are awardable in a damages case bifurcated into liability and damages phases. An award, in such a case, at the liability phase, would, however, be in direct conflict with this Court's ruling in *Hewitt*. Thus, the American Bar Association's argument is wholly without merit.

First among these is the fact that subdividing a single claim for damages into discrete parts, each of which are eligible for "prevailing party" status, can only lead to proliferation of attorneys' fee disputes. In this regard, Petitioners' approach will disserve the purposes of the Act, as plaintiffs sue for their "reasonable fee" in obtaining a "victory" on a claim for the "first dollar" in damages, and defendants sue for their "reasonable fee" in what, in any nominal damages case, will be a good claim that having to defend against a $17 million judgment was an onerous burden, imposed only through a frivolous *ad damnum* clause in the complaint. This Court has repeatedly held, however, that fee litigation is not to overshadow merits disputes. *See, e.g., Webb v. Dyer County Board of Education*, 471 U.S. 234, 244 n.19 (1985) (noting that fee litigation is " 'one of the least socially productive types of litigation imaginable' ") (citations omitted). Characterizing a nominal damages award as simply reflecting a judgment upon a single, non-frivolous claim upon which plaintiff did not prevail would eliminate the proliferation of such unproductive litigation over attorneys' fees.

Second, granting fees in such technical, *de minimis* cases of relief places enormous pressure on individual capacity and municipal defendants to settle damage claims wholly irrespective of the merits of claims or defenses. The claim that such defendants are being discriminatorily denied *their* day in court by such draconian operation of the Fees Act is substantial, and counsels reading the Act with lenity. *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 (1985) (citing *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring)). At the least, in the absence of a clear statement from Congress that pure nominal damage awards in individual capacity cases were to trigger attorneys' fees, this Court should uphold the Fifth Circuit's judgment.

Third, an interpretation of the Fees Act that condones the award of large fees in nominal damages cases can have a distorting effect on the law itself. To the person on the street, an award of many thousands of dollars in attorneys' fees for a one dollar victory is irrational, unjust, and nonsensical. Courts are undoubtedly sensitive to this fact, and it is questionable whether awarding the sort of irrational fees that were awarded in this case will yield greater compliance with constitutional precepts. Instead, it may well produce, in the lower courts if not this Court, an undue narrowing of substantive constitutional law that will make the issue of damages irrelevant, to the detriment of civil rights. Surely no one can argue that this latter, plausible response to Petitioners' conception of "prevailing party" would work to benefit plaintiffs in the sorts of broad, complex, structural equity cases where Congress did intend that Fees Act would require an award.

In short, as the Fifth Circuit found, the judgment of the District Court holding Petitioners' were "prevailing parties" was error, and properly reversed. That reversal should stand.

C. Alternatively, this Court Should Affirm the Judgment on the Ground that Circumstances Render an Award Unjust.

Although the Fifth Circuit did not address it, the law underlying § 1988 awards has always been that even a

"prevailing party" should be denied a fee when " ' "special circumstances would render such an award unjust." ' " *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 94-1011, at 4 (1976) (quoting in turn *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968))). Because the law of federal appellate practice is that the Court "may affirm on any ground that the law and record permit and that will not expand the relief granted below," *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984), amici submit the "special circumstances" doctrine as an alternative ground of affirmance of the Fifth Circuit's ruling.

The foregoing discussion indicates that, at the very least, this case is at the margins of Congress's intent in enacting § 1988, and that, on a variety of fronts, granting an award would not serve Congress's purpose. As the First Circuit's ruling in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), makes clear, the special circumstances doctrine is particularly suited to those cases where the controversy is " 'more contrived than real,' " even if a plaintiff could be deemed to have "prevailed." *See id.* at 279 n.3 (quoting *Naprstek v. City of Norwich*, 433 F.Supp. 1369 (N.D.N.Y. 1977)). The issue in this case, of course, is not whether the Court should abolish the practice of awarding nominal damages in cases where no injury whatever is shown, but whether *fees* should be awarded to counsel who file suits for damages, and win nothing more than a mere one dollar judgment.

Such suits clearly meet the test for controversies that are "more contrived than real," for the entry of nominal relief is purely symbolic, and unconnected to any "real" injury. It matters not, on this front, that a plaintiff has "won." Rather, it is simply unjust to award him or her an attorneys' fee.

Even if the Court were not inclined to foreclose fee awards in all pure nominal damages award cases, it should plainly do so in *this* case so as to clarify the factors that permit a "special circumstances" denial. Above and beyond the factors discussed previously, the original judgment which triggered this fee controversy is in all likelihood wrong as a matter of law. Indeed, as even the dissenting judge in the fee appeal below stated, one has "difficulty understanding the justification for the finding that Governor Hobby violated plaintiffs' civil rights." *See Estate of Farrar v. Cain*, 941 F.2d 1311, 1317 (5th Cir. 1991) (Reavley, J., dissenting).

As Respondent points out, this case arose out of former Lieutenant Governor Hobby's asserted role in requesting an investigation of Artesia Hall, the institution run by Petitioners' decedent. These requests, at most, constituted nothing more than unprivileged libel under the law of Texas, and could not possibly be the subject of a federal suit for damages. Indeed, this Court, only last Term, held that such claims not only fail to establish a violation of "clearly established" federal law, they fail to show "a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991).

This Court's decisions have, at least implicitly, recognized that a "special circumstances" finding is mandated as a matter of law in a case like this. In *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the Court strongly suggested that prevailing in a case that was "borderline" on the merits ought not counsel fees. Likewise, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 n.10 (1978), the Court cited with approval the Fourth Circuit's decision in *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), where the defendant was spared under the

special circumstances doctrine from attorneys' fee liability, even though it was found to have been in violation of the law, as it acted in objective good faith. Here, it is quite obvious that Respondent not only acted in good faith, but in fact committed no constitutional breach at all. *See also Garland*, 489 U.S. at 791 (citing *Nadeau v. Helgemoe, supra*, with approval as to the scope of § 1988).

The amici States, Commonwealths, and Territories, submit that a federal court, sitting at the attorneys' fee stage in a wrongly decided damages case, not only has the authority, but the duty, under the "special circumstances" doctrine, to set the record straight. This authority should be applied here to affirm the judgment. Particularly where the jury itself has found Petitioners' case to be worth nothing, circumstances do indeed make an award unjust.

For these added reasons, the Court should affirm.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit denying an award of attorneys fees should be affirmed.

Respectfully submitted, June 15, 1992.

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No. 91-990

IN THE

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OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,
Petitioners,
vs.
WILLIAM P. HOBBY, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. IN SUPPORT OF RESPONDENT.

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CONSENT OF PARTIES

Counsel have requested consent of the parties. Consent was received by both parties and filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), is a national not-for-profit citizens organization. AELE is interested in establishing a body of law making the law enforcement effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement function to protect our citizens in their life, liberty and property, within the framework of the various State and Federal Constitutions. AELE has previously appeared as amicus

curiae over eighty times in the Supreme Court of the United States and over thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc., (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and amicus curiae advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

SUMMARY OF ARGUMENT

A plaintiff, in an action brought under 42 U.S.C. § 1983, whose sole recovery is one dollar in nominal damages has not obtained a material alteration of the legal relationship of the parties and should not be entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

Nominal damages are often awarded under § 1983 in circumstances in which the plaintiff has not sustained any damages or injury and the defendant has not intentionally infringed important constitutional rights. A manifest injustice to the defendant results if the defendant is forced to pay § 1988 attorneys' fees to plaintiff, in addition to defendant's own litigation

expenses, despite the defendant's apparent victory. Denial of fees in the instant case, and similar cases, would not defeat the important goals underlying §§ 1983 and 1988 of the compensating and providing counsel for plaintiffs injured by violations of their constitutional rights by defendants acting under color of law.

To qualify for "prevailing party" status, a plaintiff must serve the role of "private attorney general" intended by Congress in enacting § 1988. Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 793, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). Fee recovery should be limited to those plaintiffs who obtain compensatory damages or receive another material alteration of the legal

relationship between the parties.

ARGUMENT

I.

PETITIONER IS NOT A PREVAILING PARTY ENTITLED TO ATTORNEY'S FEES PURSUANT TO 42 U.S.C. SECTION 1988.

The Court below held a plaintiff is not entitled to attorney's fees pursuant to 42 U.S.C. Section 1988 when the sole relief sought in a 42 U.S.C. 1983 action is monetary damages and plaintiff is awarded only one dollar in nominal damages. Farrar v. Hobby, 941 F.2d 1311 (5th Cir. 1991). Relying upon this Court's decisions in Hewitt v. Helms, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), Rhodes v. Stewart, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988)(per curiam), and Texas State Teacher's Association v. Garland

Independent School District, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), the Court stated that a plaintiff must establish that plaintiff won "at least some relief from the defendant, that the outcome of the suit changed the legal relationship between the parties, and that the plaintiff's success was not de minimis or technical victory." Farrar, 941 F.2d at 315.

The Fifth Circuit's decision should be affirmed because it correctly interpreted and followed precedent established by this Court. This Court stated:

> [A]t a minimum to be considered a prevailing party within the meaning of Section 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant . . . a technical victory may be so insignificant . . . as to be

> insufficient to support prevailing party status . . . [w]here the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied. . . . The touchstone under prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 792-93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (emphasis added) [citations omitted] .

In Farrar, no material change in the legal relationship resulted. The jury found that Hobby did not proximately cause Farrar's injury. The one dollar award does not alter the legal relationship between the parties.

No award could be more de minimis.

II.

ATTORNEYS' FEES SHOULD NOT BE AWARDED TO A PLAINTIFF WHO DID NOT SUSTAIN A CONSTITUTIONAL INJURY PROXIMATELY AND INTENTIONALLY CAUSED BY DEFENDANT.

The imposition of attorneys' fees pursuant to Section 1988 in cases where either the defendant did not intentionally or proximately cause the plaintiff's constitutional injuries would have a detrimental impact on law enforcement. Although the decision in Farrar v. Hobby does not directly relate to law enforcement, the decision will affect Section 1983 suits brought against law enforcement and municipalities they serve.

In Farrar, plaintiff alleged then-Lieutenant-Governor William Hobby was partly involved in events which led to

the closing of Artesia Hall, a facility for teenagers operated by Farrar. The jury found Hobby did not engage in a conspiracy against the plaintiffs and his actions were not the proximate cause of plaintiff's injury. Thus, no evidence established that Hobby's actions caused a deprivation of plaintiffs' constitutional rights. Hobby acted within his discretion as Lieutenant-Governor.

The issue whether a plaintiff is entitled to attorneys' fees pursuant to § 1988 where plaintiff's sole recovery is nominal damages has been treated differently by the various Court of Appeals. An analysis of two cases, Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991), and Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1991), and Romberg

v. Nichols, 953 F.2d 1152 (9th Cir. 1992) illustrates this point.

The court denied recovery of attorneys' fees in Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991). Police officers believed a call from a neighbor that the plaintiff threatened the neighbor with a knife. The case involved a fifteen minute investigation by officers, plaintiff's arrest, and incarceration of less than two hours. Id. at 951. The Court stated that the case was a "blow up of a routine street arrest on a citizen's call." Id. at 958. The court stated, "[t]o turn a single wrongful arrest into a half year's work, and seek payment therefor, with costs, amounting to 140 times the worth of the injury, is, to use a benign word, inexcusable." Id. at 956.

In comparison, the Ninth Circuit's recent decision in Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1992), is illustrative of the manifest injustice in imposing § 1988 fees against a police department or its officers where the officer's act in subjective good faith and only nominal damages are awarded. In Romberg, police officers believed their entry into the Romberg's apartment was justifiable to save Mrs. Romberg from serious harm. Id. at 1154. At trial, only $1.00 in nominal damages of the $2 million sought in the complaint were awarded to plaintiffs. Id. at 1154-55. However, the Ninth Circuit upheld the award of attorneys' fees against the officers.

The division in the Circuits necessitates a definitive decision by

this Court on this issue. A decision in favor of Petitioner would only serve to encourage attorneys solely in pursuit of their own fee recovery to bring actions not involving important constitutional rights and not involving an injured plaintiff where the only possible recovery for a plaintiff is $1.00 in nominal damages. Counsel would be able to recover exorbitant fees.[1] The underlying purpose of § 1988 is to enable injured plaintiffs to obtain counsel and not "to enable counsel to obtain munificent fees". Lewis, supra, at 956.

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[1] Plaintiffs in § 1983 actions brought against municipalities for actions by their law enforcement agencies often request hourly rates in the range of $250.00 to $300.00 per hour and further request a multiplier of that amount.

A. An Award of Attorneys' Fees Would Unjustly Punish Respondent and Would not Deter Future Violations of Constitutional Rights.

This court in Carey v. Piphus, 435 U.S. 247, 257, n.11, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), recognized that an award of attorneys' fees pursuant to § 1988 "provides additional- and by no means inconsequential- assurance that the agents of the State will not deliberately ignore due process rights". (emphasis added). However, this decision does not mandate a fee award in this case. A fee award would not serve to deter any future unconstitutional behavior.

The decision in Carey established to receive compensatory damages in a Section 1983 action, the plaintiff must sustain actual injuries caused by the deprivation of constitutional rights.

Absent actual injury, only nominal damages may be awarded. Id. at 266. "[T]he basic purpose of a Section 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights . . . ." Id. at 254.

In the law enforcement arena, officers may negligently or unintentionally cause a constitutional deprivation which may give rise to a nominal damage award or one dollar jury verdict, even though the officers and the law enforcement agency did not deliberately intend to violate an individual's rights. These situations may arise in a variety of contexts, including responding to apparent life threatening situations as in Lewis and Romberg, executing a search warrant, or

stopping and detaining a suspect. An award of attorneys' fees would not deter any future deprivation of constitutional rights in these situations. Simply stated, an award of attorneys' fees would unnecessarily punish the municipality, and its taxpayers who ultimately bear the burden of the cost, for conduct which the officer believed was reasonable.

B. Denial of Attorneys' Fees Would Not Undermine the Purpose of § 1983.

Affirming the Fifth Circuit's decision in Farrar will not dilute the significance of this Court's recent opinion in Hudson v. McMillian, ___ U.S. __, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). This Court held that use of excessive force against a prisoner which does not result in a significant injury

may constitute cruel and unusual punishment and support a claim under 42 U.S.C. Section 1983.[2]

The Fifth Circuit's decision in Hudson applied a "significant injury" requirement before plaintiff can recover under 42 U.S.C. Section 1983. This Court reversed the Fifth Circuit and found the extent of the plaintiff's injury provides no basis for dismissal of a Section 1983 claim. The Court found Hudson's injuries, including bruises, swelling, loosened teeth and a cracked dental plate, "are not de minimis for Eighth Amendment purposes." Id. at 1000. This Court in Hudson, indicated its intolerance for police or

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[2] AELE and the Department of Justice submitted an amicus brief in Hudson v. McMillian in support of the inmate plaintiff.

correctional officers brutality. However, Hudson involved intentional brutality causing actual injury which would support an award of attorneys' fees.

The Fifth Circuit in Farrar emphasized their holding denying attorney's fees will not undermine the importance of finding a constitutional violation. 941 F.2d at 1315. Instead, the Court found the sole object of plaintiff's suit was to recover monetary damages and recovery of merely one dollar does not support "prevailing party" status under Section 1988. Id. at 1315. Actions done within a governmental official's discretion in subjective good faith with no intent to cause a constitutional deprivation should not support a fee award under

§ 1988 where the plaintiff is only entitled to and receives nominal damages.

CONCLUSION

Accordingly, Amici respectfully request this Court affirm the decision of the Court below and hold that a plaintiff in a 42 U.S.C. § 1983 who recovers only nominal damages is not entitled to "prevailing party" status to recover attorneys' fees under 42 U.S.C. § 1988.

Date: June 12, 1992

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(12)

No. 91-990

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

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as Co-Administrators of the Estate
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vs.

WILLIAM P. HOBBY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT WILLIAM P. HOBBY, JR.

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QUESTION PRESENTED

Is a plaintiff who seeks a large damage award, but recovers only one dollar as nominal damages for a technical violation of his constitutional rights, a "prevailing party" within the meaning of 42 U.S.C. § 1988 and this Court's decisions in Hewitt v. Helms[1/], Rhodes v. Stewart[2/], and Texas State Teachers Assn. v. Garland?[3/]

1/ Hewitt v. Helms, 482 U.S. 755 (1987).

2/ Rhodes v. Stewart, 488 U.S. 1, 3-4 (1988).

3/ Texas State Teachers Assn. v. Garland Indep. School Dist., 489 U.S. 782 (1989).

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Respondent.

On Writ of Certiorari to the
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for the Fifth Circuit

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT WILLIAM P. HOBBY, JR.

INTEREST OF THE AMICUS

The County of Los Angeles which appears as Amicus[4/] in this action has an abiding interest in this case as an entity which has been and is currently subject to substantial attorneys' fees awards in cases where nominal damages of one dollar ($1) have been awarded.[5/]

The Judgment of the Fifth Circuit in this case, Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), is in direct conflict with the Ninth Circuit's decision in Romberg. This Amicus submits that Farrar is correct and should be upheld by this Court because

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4/ Respondent's consent letter is attached as an exhibit to this brief.

5/ See, e.g., Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1992) (nominal damage award of one dollar; attorneys' fees award of $29,137.50). Defendants in Romberg are deputy sheriffs of the County of Los Angeles. Their Petition for Rehearing En Banc to the Ninth Circuit Court of Appeals has been pending since January 26, 1992.

the Petitioners were not "prevailing parties" in the underlying action. For the reasons set forth herein, a reversal of Farrar would promote the deception of juries and conflicts of interest between civil rights plaintiffs and their counsel. The result would be to encourage district courts to " . . . reward lawyers who, in the later stages of the fight, abandon their client's interest to pursue their own when the battle seems otherwise lost . . . [by asking for nominal damages] in order to preserve prevailing party status . . . ."[1]

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[1] This Brief focuses solely on the conflict of interest which would be encouraged if Petitioners' position were adopted by this Court. (This point is briefly addressed in Respondent's Brief at pages 17-18) While the touchstone of the "prevailing party" inquiry is whether there has been a material alteration in the legal relationship, this Brief omits a discussion of why nominal damages alone do not meet the threshold for entitlement to fees since Respondent and the Amici from Hawaii and Nevada have thoroughly addressed this point.

Romberg, supra, 953 F.2d at 1160.

ARGUMENT

1. ALLOWING A PLAINTIFF WHO ONLY RECOVERS NOMINAL DAMAGES OF ONE DOLLAR TO COLLECT ATTORNEYS' FEES IS CONTRARY TO THE PURPOSE OF § 1988 BECAUSE IT ENCOURAGES A CONFLICT OF INTEREST BETWEEN THE ATTORNEY AND CLIENT.

A. The Adoption of Petitioners' Position Would Encourage Unjust Results and Jury Deception

The problem presented to the Amicus by this Petition is very real; not only to the County of Los Angeles as an entity responsible to indemnify[2] its law enforcement officers, but also to its taxpayers. If this Court reverses the Fifth Circuit's denial of attorneys' fees to the Petitioners, civil rights plaintiffs' counsel will

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[2] California Government Code Section 825(a); MacDonald v. Musick, 425 F.2d 373, 376 (9th Cir. 1970), cert. den. 400 U.S. 852 (1970).

be encouraged to argue to the jury in non-meritorious or losing cases that, as in Romberg, supra:

> "Mr. and Mrs. Romberg in this case don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages." Id. at 1160.

Romberg is typical of a growing trend of cases brought under 42 U.S.C. § 1983 involving alleged civil rights violations because it involved a prayer for several million dollars in money damages yet resulted in a verdict of nominal damages only.[3]

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[3] See, e.g., Romberg, supra, (Jury award of one dollar for Forth Amendment violation, even though plaintiff initially sought two million dollars in relief); Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) (Jury award for Fourth Amendment violation was technical and *de minimis* where plaintiff sought $300,000 and received jury verdict for $1,000).

Interestingly, in the instant case, the jury's verdict in the District Court was for Petitioner with no money damages whatsoever.

Typical of this trend of cases, where plaintiffs' counsel have made eleventh hour pleas for nominal damages, is Brooks v. Cook, 938 F.2d 1048, 1050 (9th Cir. 1991) in which this Amicus was involved. The complaint sought $2,000,000 but by the time of trial plaintiff's trial counsel, sensing he would not otherwise prevail, reduced his request in summation to "a nominal verdict of one dollar" so that he would be eligible for attorneys' fees.

In these cases the plaintiff loses because he or she recovers no damages, and the defendants lose because they must pay the attorneys'

fees of both sides; the only winners are the plaintiff's counsel. This Amicus suggests that this Court adopt a rule that in civil rights cases where only nominal money damages are sought or awarded, the District Court must order that plaintiff demonstrate that the judgment materially affected the legal relationship between the plaintiff and the defendant in order to award fees.[2/] This rule is consistent with and would further the statutory interpretation of the "prevailing party" concept set forth

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[2/] See, e.g., Spencer v. General Electric Co., 894 F.2d 651, 662 (4th Cir. 1990) (Plaintiff who received nominal damage award entitled to 'prevailing party' status since in addition to monetary recovery, his suit served as a catalyst for prompt development and promulgation of the employers anti-harassment policy.) Cf. Denny v. Hinton, 131 F.R.D. 659 (M.D.N.C. 1990) (Jury verdict of one dollar was *de minimis*, since judgment had no effect on relationship between plaintiff and defendant.), aff'd mem., Denny v. Elliot,, 937 F.2d 602 (4th Cir. 1991) and Lawrence v. Hinton, 937 F.2d 603 (4th Cir. 1991).

in this Court's decision in Texas State Teachers, supra, 489 U.S. at 792-3.

Regrettably, the Romberg and Brooks decisions of the Ninth Circuit seem to compel attorneys' fees awards where only nominal damages are recovered.[10/] In affirming the decision of the Fifth Circuit, this Court should clarify that District Courts have the discretion to prevent such abuses of the system by granting such awards to plaintiffs' counsel who "recognize that [their] own case is not especially strong [and] drastically reduces [their] initial claims and asks the jury for nominal

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10/ Other decisions of the Ninth Circuit are irreconcilable with Romberg and Brooks. See., e.g., Robinson v. Arivoshi, 933 F.2d 781 (9th Cir. 1991); BSA, Inc. v. King County, 804 F.2d 1104, 1112 (9th Cir. 1986). This intra-circuit conflict could be resolved by this Court's decision upholding the Fifth Circuit.

damages." Romberg, supra, 953 F.2d at 1160.

As District Judge Williams stated in the Brooks trial record to the plaintiff's counsel:

> "Well, what you're asking me to do then is to let you, uh, pull a sneaker on the jury, and get away with it . . . . So you could then come in [sic] say I'm the prevailing party, so give me attorneys fees.
> . . . .
> I'm not going to let the jury go into that deliberation room with, uh, that--I don't want to use the word fraud but I'll use it--pull upon them. My job is to instruct the jury, not to deceive them."

Brooks, supra, 938 F.2d at 1050.[11/]

11/ In a situation such as this, where attorney's fees may be awarded following a $1.00 damage award, the plea for nominal damages represents more than just a plea for vindication - - it is a request that the jury unknowingly give plaintiff's counsel the right to subsequently seek, outside of their presence, an amount of money potentially tens of thousands of times the amount of the nominal damage award. Then, under Venegas v. Mitchell, 495 U.S. 82, 87 (1990) the plaintiff's counsel could redistribute the fees to his client, effectively thwarting the

This Court should discourage any future "sneakers" by upholding Farrar.

B. The *Romberg* Case Illustrates the Problems of Conflict of Interest and Deception of the Jury

In Romberg, supra, plaintiff's counsel acknowledged the limited significance and technical nature of plaintiff's only remaining claim by arguing at the close of the trial for nothing more than nominal damages.[12] The jury's award of $1.00 to each plaintiff and against the individual deputy defendants, while denying them punitive damages, demonstrated their belief that the defendants were acting in good faith. The peculiar facts of this one isolated incident lead to

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jury system.

[12] Before trial concluded, the District Court dismissed the County, one deputy sheriff and most of plaintiff's claims. Romberg, supra, at 1155.

considerable doubt that the verdict rendered would have any far-reaching effect in furtherance of Fourth Amendment rights in general. The fact that the deputies were acting out of a good faith concern for the safety of others negates any deterrent effect[13] that that case would otherwise have.

Last minute requests for nominal damages at the close of testimony where high damages were originally sought have ramifications beyond the desired message that only an isolated and technical violation has occurred. These strategic "bailout pleas" drastically and unfairly reduce the

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[13] The Farrar's District Court's implicit assumption that the case would contribute to deterring "impermissible conduct by government officers" is baffling. (Pet.App.A-23, 24, 25, cited in Petitioners Brief at pg. 19). No showing has been made by Petitioners that the mere garnering of a jury verdict, with no money damages, has led to or was intended to lead to a change in anyone's behavior.

possibility that the jury will return defense verdicts and award no damages at all. Through such arguments, plaintiff's counsel can expressly invite juries to provide plaintiffs technical and *de minimis* victories solely to preserve "prevailing party" status for purposes of § 1988. Although this Amicus does not belittle a plaintiff's sense of vindication nor doubt their counsel's general sincerity, to award attorney's fees to plaintiffs as "prevailing parties" in cases such as Romberg is contrary to the legislative intent behind § 1988[11] and the touchstone established by this Court in Texas State Teacher's.

In light of the importance of

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[11] Congress did not intend for § 1988 to provide a "windfall" to civil rights attorneys. See, Riverside v. Rivera, 477 U.S. 561, 580 (1986).

upholding individual constitutional rights, this Amicus does not propose that plaintiffs receiving nominal damages never be considered as prevailing parties for purposes of § 1988. Such a rule would discourage future plaintiffs from seeking vindication of their civil rights through the Courts. This Amicus does not seek this result.

However, by affirming the District Courts' discretion to deny attorneys' fees and prevailing party status to plaintiffs who prevail only in the technical or *de minimis* sense, this Court can reaffirm the proper balance between the right of citizens to seek redress in the Courts and the Court's right to protect the court system and the taxpayers from the abuse exemplified by Romberg and

Petitioners' position in this case. Of grave concern to this Amicus is the creation of new precedent in this case which will encourage plaintiffs' civil rights attorneys to enter into contingency fee agreements with clients seeking compensatory damages at the outset while reserving the right to, at the close of testimony, weigh the odds of success, and if unfavorable, request only nominal damages in an effort to preserve attorneys fees under § 1988.

In this scenario, only plaintiff's counsel wins. The plaintiff, who filed suit hoping for compensatory damages, receives nothing; defendant, whose client did not justify actual or punitive damages, is forced to pay high attorney's fees, and the courts are

burdened with increased litigation.

Few juries are likely to resist a plea for nominal damages at the close of the trial. Juries are generally unaware that an award of even $1.00 - - - or perhaps even one cent - - - could entitle a plaintiff to receive attorney's fees from the defendant. From the jury's perspective, a nominal award in response to plaintiff's counsel's request gives them the apparent opportunity to "make everybody happy" by giving plaintiff a token win at no real financial cost to the defendant. Yet, this is the kind of "compromise verdict" which is clearly prohibited.[13] The instant case

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[13] "Part of a district court's function, . . . is to prevent such 'Solomonic solutions' by the jury. When a jury compromises its verdict, its verdict should not stand. Romberg, supra, 953 F.2d 1160; National R.R. Passenger Corp. v. Koch Indus.,

provides an opportunity to discourage future Romberg-type abuses of the Civil Rights Attorney's Fees Awards Act. This Amicus submits, as it argued in Romberg, that a technical violation of civil rights made by defendants acting in good faith should not support prevailing party status, particularly when a plaintiff's initial request for exorbitant damages is reduced to a concession that the evidence supports at the close of trial only nominal damages. The encouragement of such tactics defies principles of judicial economy and is directly contrary to the legislative principles underlying § 1988 and the

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701 F.2d 108, 110 (10th Cir. 1983) ("A compromise verdict is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages . . . [s]uspicion should be aroused if the jury awards only nominal damages.)

reasoning of this Court. This Court should speak clearly and forcefully in this case that such tactics are not to be rewarded by upholding the decision of the Fifth Circuit Court of Appeals.

CONCLUSION

The judgment of the United State Court of Appeals for the Fifth Circuit should be affirmed.

DATED: June 15, 1992

Respectfully submitted,

BY Richard P. Towne
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June 11, 1992

BY TELECOPY

Mr. Keith A. Fink
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Re: *Farrar v. Hobby*, cause no. 91-990 in the Supreme Court of the United States

Dear Mr. Fink:

I am writing on behalf of our client, William P. Hobby, Jr., the respondent in the above case.

We consent to the filing of an *amicus* brief by the County of Los Angeles in support of the respondent's position.

Thank you again for your interest and assistance.

Very truly yours,

Patrick O. Keel